Filed 3/25/03 Hale v. Provident Life and Accident Ins. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LORETTA J. HALE, Plaintiff, Appellant and Cross-Appellant, v. PROVIDENT LIFE AND ACCIDENT INSURANCE CO. et al., Defendants, Respondents and Cross-Appellants.	A092548, A092833 (Contra Costa County Super. Ct. No. C98-01411)

INTRODUCTION

Plaintiff Loretta J. Hale (Hale) sued defendant Provident Life and Accident Insurance Company (Provident) over its refusal to pay benefits due on her claim for residual disability benefits under a Provident disability insurance policy. Both parties appeal from the judgment of the Contra Costa County Superior Court following a month-long jury trial.

On appeal Hale contends: (1) prejudicial error in jury instructions on her cause of action for bad faith breach of the covenant of good faith and fair dealing requires retrial of that cause of action; (2) the judge erred in refusing to admit "pattern and practice evidence" of Provident's handling of other claims, which error should be remedied on retrial; and (3) the trial court erred in granting a nonsuit/directed verdict on her claim for punitive damages.

On cross-appeal Provident contends: (1) the fraud verdicts for negligent misrepresentation and intentional concealment cannot be sustained because there was no substantial evidence of detrimental reliance by Hale on any misrepresentation or concealment; (2) the damage verdict on the intentional concealment cause of action must be reversed where the court gave erroneous and factually unsupported instructions relating to Hale's peculiar susceptibility to emotional distress; (3) the court erred in failing to grant Provident a directed verdict and/or a judgment notwithstanding the verdict on the negligent misrepresentation cause of action where none of the damages awarded were recoverable as a matter of law; and (4) the breach of contract verdict is unsupported by substantial evidence.

STATEMENT OF FACTS

Hale is a professional real estate agent in the San Francisco Bay Area. She and her husband have two children who, at the time of trial, were 9 and 11 years old. Hale began working as a real estate salesperson in 1986. Her earnings were substantial. Until the onset of her illness, Hale was a top producer. She was in the top 10 percent of agents in the marketplace, working seven days a week an average of 55 hours per week. She continued to produce at that level until she became ill in June 1995. Hale's gross earnings before expenses (estimated to be between 15% to 20% of her gross earnings) were as follows: In 1988 she earned $321,777; in 1989 she earned $286,242; in 1990 she earned $321,148; and in 1991she earned $217,412. In 1992 she earned $133,065 and in 1993 she earned $108,216. In November of 1993, Hale changed real estate offices and her income for 1994 dropped as a result of factors related to that move to $77,000. In the six months between January 1995 through June 23, 1995, when she became disabled, Hale earned $78,000. Jeffrey Sposito, vice-president and manager of Prudential California Realty, for whom Hale worked beginning in 1993, confirmed that Hale had been a top producer when he recruited her and she continued to be a top producer for that company until her illness, although the real estate market was depressed from 1993 into 1995.

By all accounts, Hale worked very hard before her illness. Although she and her family traveled regularly, she never took a vacation during which she did not work. Hale employed an assistant, had a near photographic memory for written detail, and was extremely organized.

In 1989 Hale and her husband met with insurance agent Jeff Alongi to compare the benefits of Hale's existing disability insurance policy with one offered by Provident. When Hale was young, her father, a firefighter, mechanic and bricklayer at various times, had always worked two jobs. After he was injured on the job, he could not make the $115 per month house payment. This childhood experience led her to buy disability insurance.

The Provident policy offered benefits which Hale considered to be far superior to those available under other policies she and her husband considered. The Provident policy provided disability benefits if the policy holder became disabled from his or her "own occupation" as compared to other policies which limited benefits for disability from one's own occupation to 60 months and thereafter paid benefits only if the insured was disabled from "any occupation." The policy also offered, for additional semi-annual premium payments, a non-cancelable "residual disability benefits with cost of living indexing based on prior monthly income" benefit ("residual disability benefit") which was triggered when the insured was not totally disabled, but suffered a loss of income of 20 percent or more. This Provident policy was known as the "337" policy and was referred to by the agent as "top notch," the best, or the "Cadillac" of disability policies.

Hale purchased her 337 disability income policy, effective August 1, 1989. It provided that in the event Hale were to become totally disabled, she would receive a maximum benefit of approximately $4,000 per month. Updates in later years caused the maximum benefit to rise to $5,651 per month. Hale paid approximately $2,600 per year for the initial coverage and the premium for the policy rose as the benefits increased. As benefits increased "automatically," Hale was required to provide certain income information to Provident and she did so. Hale understood that no payment was due her until she provided a proof of claim.

Hale also purchased the "residual disability benefit." As with total disability benefits, the residual disability benefits are incurred and payable on a monthly basis. When totally disabled, the insured receives a flat monthly payment stated on the face of the policy. In contrast, the residual disability benefit changes from month to month based on several factors, all of which have to be updated on a monthly basis with a new proof of claim before the benefit can be calculated and payment made. Residual disability benefits are calculated each month by a formula set forth in the policy. Each month, the "Residual Disability Monthly Benefit" is calculated by dividing "Loss of Monthly Income" by "Prior Monthly Income" and multiplying the result by the "Monthly Benefit for Total Disability" as follows: Loss of Monthly Income/Prior Monthly Income x Monthly Benefit for Total Disability.

The policy defines "Loss of Monthly Income" (LMI) as: "the difference between Prior Monthly Income and Current Monthly Income. *Loss of Monthly Income must be caused by the Residual Disability for which claim is made.* The amount of the loss must be at least 20% of Prior Monthly Income to be deemed Loss of Monthly Income. If your loss is more than 75% of Prior Monthly Income, we will deem the loss to be $100%." (Italics added.)

"Prior Monthly Income" (PMI) is defined in the policy as "the greatest of:

"1. your average Monthly Income for the 12 months just prior to the start of the period of disability for which this claim is made;

"2. your average Monthly Income for the year with the highest earnings of the last two years prior to the start of such period of disability; or

"3. your highest average Monthly Income for any two successive years of the last five years prior to the start of such period of disability."

" 'Current Monthly Income' means your Monthly Income in your occupation for each month of Residual Disability being claimed."

" 'Monthly Income' means your monthly income from salary, wages, bonuses, commissions, fees or other payment for services which you render or your business provides. Normal and usual business expenses are to be deducted; income taxes are not.

Monthly Income must be earned. It does not include dividends, interest, rents, royalties, annuities, sick pay or benefits received for disability. . . ."

In the early 1990s, Provident recognized that the 337 residual disability policy would produce future losses of $275 million over the next 30 to 40 years. Ralph Mohney, senior vice-president of customer care for Provident, testified about the 337 policy and the analyses that Provident had prepared regarding strategies for reducing the company's reserve for expected future losses attributable to these policies. A memorandum titled "Situation Analysis Provident Disability Operation" prepared in 1994 by Tom Hays, head of product development, experience analysis and risk management in claims and underwriting, stated that these policies, sold between 1980 and 1994 were "poorly underwritten and underpriced." The memorandum reported that "[p]rofits from this line of business peaked in 1990, and thereafter the operation suffered deteriorating financial results due to successive reserve strengthening actions. *The profit cultivated in 1993 resulted in a $275-million-dollar charge to create a reserve for expected future losses on this business.* . . ." (Italics added.) In short, Provident had determined that over the next decades the company would lose approximately $275 million on these policies. Therefore, a charge to the reserves in that amount was made in 1993 and caused a significant reduction in company earnings. In view of these concerns, in 1994 Provident took a number of steps to control this product line and to reduce the reserves required to be maintained by closing cases. Claims operations which had been decentralized in field offices were centralized in Chattanooga, Tennessee. The development of a new product line moved away from the "own occupation concept . . . ." (The company eventually discontinued selling the 337 noncancelable own occupation policy. As of the date of trial, noncancelable, "own occupation" policies were being offered only for a finite number of months. After expiration of the finite period, the policy covered disability from "any occupation".) The Hays memo also recognized that "[m]uch of this year [1994] has been spent in developing that organization. Somewhat of a crisis atmosphere has existed in the continuing high level of new claims." Before 1994 there was no personnel unit in place to handle claims involving mental or nervous

impairment. In 1994, a psychiatric or mental unit was developed. During that time, the disability operation continued to generate large statutory losses and the existence of the special reserve on the block of business written prior to 1994 created a huge drag on the company's reported rate of earnings. In response, Provident added additional medical resources to help the claims people. It also expanded the "Round Table Review" or "special review" process. Doctors, lawyers, other technicians were brought in to assist in the claims evaluation procedures.

In June 1995, Hays prepared a memorandum for company president Harold Chandler, as the first in a series of monthly reports focusing on performance accomplishments and direction for risk management. He wrote that "Claim terminations in May were $41 million, which is the highest they have ever been in a 'non-scrub month.' We continue to improve the termination level and have a good chance of meeting our goal of $132 million in terminations for the quarter. This would be ten percent above the average last year. . . . However, as you know, reserves on new claim in May were the highest of any month this year. Once again, we are affected by the larger claims . . . . [¶] The legal review meetings on Tuesday and Thursday evenings [the Round Table Reviews] ha[ve] proved to be quite worth while. As you know, we began those on April 25th through May 25th. 57 claims totaling $45 million in reserves have been presented. Five of those were $2.7 million. Reserves have been closed. Another $4.6 million on six claims have been resolved with closures pending. We still have 45 claims which are in the process of additional fact finding. It will be important for us to follow through expeditiously on these."

Dr. William Feist, former medical director and vice-president of Provident testified that the whole purpose of the Round Table Review process was to work toward closing those cases which had been submitted for review, in other words to get rid of existing claims which had been paid for some period of time. Mohney wrote a memorandum to the company president, explaining: "Broadly, these initiatives . . . are designed to move Provident from a claim-payment to a claim-management approach. The keys to this transition are more intensive claim investigation and skilled development

to maximize effectiveness. . . . [¶] Due to the significant financial leverage associated with individual disability claims, the return on these claim improvement initiatives is expected to be substantial. A one% decrease in benefit cost due to more effective claim management translates to approximately $6 million in annual savings. We believe that aggregate improvements in the 5% to 10% ($30 million-$60 million range) . . . are possible, once the initiatives have been fully implemented."

In May 1995, the 337 claims were the highest ever. The company could not control the number of new claims on existing policies. It could maintain a ratio of new claims to existing claims by terminating existing claims, that is, by getting people back to work and by identifying situations where individuals were not entitled to benefits. Provident estimated it could obtain a claim resolution or termination ratio of 84 percent. This would translate into a significant reduction in the reserves required to be set aside for future payments on existing claims. In December 1996, after six months of experience with the "special review" process, Hays wrote: "Our net resolution ratio for the year-to-date is 98%. This compares to 74% for the full year '95 and 84% [if] the first quarter of '95 is excluded. Clearly, there has been a great payback for the investment we have made. A part of that investment has been intensified surveillance and independent medical exams, expenses which will be over budget by $1.5 million in 1996. But as we have done more of it, the higher activity level has been justified." Provident instituted a number of awards and incentives for its claims personnel. It offered a "back to the future" award, given to claims people who got claimants back to work after a disability claim. The company gave a "Columbo Award" for investigative skills and diligence and a "Valedictorian Award" for evaluation of a claim. The company president also initiated an apparently short-lived "H-V Award."[1] Richard Leiderman, the supervisor overseeing management of Hale's residual claim was the first winner of the "H-V Award."

In June 1995, Hale was diagnosed with metastatic breast cancer and began treatment. She underwent a mastectomy and reconstructive surgery in July 1995, and

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1 The award was in fact called the "Hungry Vulture Award," but the judge refused to allow the jury to hear the term, believing it was more prejudicial than probative.

then began chemotherapy with an oncologist, Dr. Randall Oyer. Her chemotherapy ended on November 13, 1995. Hale's cancer was in remission following her surgery and chemotherapy, until it returned in 1998. Her residual disability claims difficulties occurred during the period of remission.

Dr. Oyer testified that chemotherapy drugs can be damaging to the brain, liver, lungs, heart, kidneys and nervous system. Hale suffered from numerous side effects, including but not limited to complete loss of all body hair, depressed blood count, fatigue, nausea, and confusion. The term "chemo-brain" was coined to refer to memory and thinking deficits experienced by persons who had undergone chemotherapy. Dr. Oyer testified that it takes patients at least one year to "get over" chemotherapy and that some patients never recover.

Dr. Peter Brown testified that many cancer patients have significant emotional distress. Metastatic breast cancer is invariably fatal. The average survival of a person with a diagnosis and "spread" similar to Hale's is 18 months. Dr. Brown testified that breast cancer patients suffer both acute and long-term stress. Especially following a recurrence, there is no "good news" here; the psychological burden is worse.

Hale's surgeon referred her to a psychotherapist following her cancer diagnosis. Psychiatrist Dr. Burton Presberg treated Hale following her surgery. He first saw her in April 1996. At that time Hale was suffering from depression, was tearful, had energy problems, sleep problems, anxiety attacks, sweating, racing heart and awful memories of her treatment. Dr. Presberg prescribed antidepressants and continued to see her from time to time, including at the time of trial. Following her diagnosis, Hale was also treated on an ongoing basis by Erika Maslan, a masters level psychologist (marriage and family counselor) who works primarily in the area of psychoncology.

Several witnesses testified that following the surgery and cancer treatment in 1995, Hale had trouble with her memory and trouble with organization. She missed appointments and was extremely fatigued. All the while, she was "upbeat" and reporting to her oncologist such things as she felt "one thousand times better." Nonetheless, Hale explained that her memory was "horrible" and gave as an example, that after living in the

East Bay for 20 years, she could not recall how to get on the freeway to her husband's office. This was dramatically different from before her illness. At one point, Hale's determination and efforts to resume a "normal life" led her to temporarily discontinue her antidepressant medicine, with the result that her depression deepened severely.

The sales agent who had sold her the Provident policy reported to Provident that Hale had become disabled with cancer. Doctor reports were provided regularly to Provident. In addition, Sally Moore, the Provident claims handler for Hale's total disability claim prepared a field service request, directing investigator Chris Moffatt to meet with Hale in person to view her condition. Moffatt met with Hale in September 1995 and reported to Provident, confirming that Hale was undergoing chemotherapy; that she could not return to work because she was stricken with nausea, fatigue and lack of ability to concentrate. He saw that she had alopecia (no hair or eyebrows). Dr. Oyer, Hale's oncologist, reported on July 2, 1996, in a signed "Attending Physician Statement" that Hale was suffering from posttraumatic stress reaction to a diagnosis and treatment for breast cancer. He stated that Hale was unable to function in her role as a real estate broker, but that she had strong motivation to recover. During this period, Hale tried to continue to maintain her household and to care for her children. She also reported to Provident that she was traveling some with her husband and/or children. Nevertheless, in September 1996, Hale's oncologist reported that after accompanying her husband on his business trip to Hong Kong, Hale was still feeling the effects of the cancer, including "bone pain, fatigue, and post-chemotherapy." Responding to the question, "In your opinion, when will patient be able to return to work," Dr. Oyer responded, "Until January '97. Patient will attempt return to work part-time in January 1997. She continues to have weekly appointments with Dr. Erika Maslan for post-chemotherapy depression. Unable to return to work until January '97."

Toward the end of 1996, Provident fell behind in making total disability payments to Hale. No payments had been made since September 1996.

Moore had contacted Maslan some time before August 22, 1996, to request Hale's records. On that date, Maslan called Moore to say that she would get the records out as

soon as possible. On November 5, 1996, Maslan received a fax from Moore again asking for the records, including "process notes." "Process notes" record what the patient is saying that the therapist regards as significant. They are typically one-paragraph notes of what the patient is saying. Maslan's written process notes were sketchy. This is common and appropriate in the psychotherapeutic field. Maslan testified that she called Moore before Thanksgiving in response to the November 5, 1996 fax requesting her "process notes" relating to Hale. Maslan testified that she did not transcribe her unreadable handwritten process notes, because Moore told her that would not be necessary as all Moore required was an narrative summary of her last two sessions with Hale. Maslan testified that she sent that summary to Moore on December 3, 1996. Provident never received this letter or the narrative summary and Maslan testified she never again sent her records to Provident or its medical records agent, because she feared they would be lost. Instead, she continued to complete the monthly attending physician's statements including her remarks and checking the applicable formal diagnostic codes and returned them to Hale to forward to Provident.

Moore testified that also on November 5, 1996, she called to request Hale's medical records from Dr. Oyer, including both an attending physician's statement form and office notes from September. She received substantially the same information as previously provided, certifying Hale's disability and stating that Oyer believed Hale would attempt to return to work part time in January 1997.

In November 1996 Hale's case was presented for "Round Table Review." The document presenting the case at the Round Table states: "She still complains of bone pain, fatigue, post-chemo and depression . . . . [T]arget date of January '97 to return to work. And since she has residual [disability coverage], we may have something to work toward transferring and/or even closure." Sally Moore wrote on the bottom of the form coming from the case review that Moffatt should again be sent to Hale's home; this time to discuss her return to work. Moffatt was given authority to "resolve the claim" by offering Hale 100 percent of her disability for two months, then one month of 75 percent

of her disability payment and one month of 50 percent of her disability payment to close the claim.

Moffatt saw Hale again in December 1996, not long before Christmas. At that time Hale had not been paid her monthly total disability payment since September.[2] Moffatt said the company had authorized him to pay for the back benefits and to pay future benefits at the decreasing rate until April to help her get back on her feet. Moffatt pressured Hale to make a decision "today." Hale told Moffatt she did not know what residual disability benefits meant and she wanted a chance to reflect on a written offer and an explanation of "residual" benefits. Moffatt never prepared a written offer. Instead, he told Hale he was not qualified to discuss residual disability, but that if she went on residual disability, the company would require " 'all this financial information, tax reports. Basically, they will just paper you to death.' " When Hale expressed a desire to speak with her husband about this offer, Moffatt replied: " 'You're an independent business woman. You're successful. Why do you have to discuss it with your husband.'" Moffatt reported to Provident that Hale planned to return to work, "however because of her disability, she has become very unorganized, cannot handle stress well, can't do too much at once, her memory is poor but is getting better, she feels overwhelmed with simple tasks, has trouble handling multiple tasks; she can't organize her day like she could before, and states she must manage and do her business in a different way. . . . [¶] Throughout the interview, the insured stated, 'I want to live to see my children grow up.' " He also reported that Hale had told him she and her family went to Hawaii during the Thanksgiving holiday as they did every year and that she and her husband had gone to Hong Kong in August.

After Christmas, Hale received payments for September 22, 1996, through December 1996 on her total disability.

In January 1997, Hale returned to work part time. Therefore, her claim was transferred from Sally Moore in the total disability unit to Donna Galbraith in the

"residual disability" claim unit. Galbraith obtained the Hale file in March 1997. Galbraith's task was to carry out the existing action plan. The action plan included: sending an attending physician statement to Dr. Oyer; the already-completed field meeting with Hale and offer of four months of benefits in exchange for termination of Provident's obligations; sending a "residual packet" to Hale; and possibly sending an attending physician statement to psychologist Maslan. In March 1997, Galbraith sent Hale the residual packet, including a letter informing her that she was entitled to select from three options in order to determine her PMI. The letter did not repeat the policy language that the insured could pick the greatest of the three options for figuring PMI. The letter informed Hale that she must also provide Provident with income tax returns and schedules for the three years selected and for the year preceding the disability. It also told Hale that she must present documentation of her current monthly income, including profit and loss statements for each month for which she claims disability. Hale was also required every month to return to Provident an "Insured's Supplementary Statement of Claim." One side of this two-sided form was to be completed by Hale regarding her current disability and signed by her giving permission for release of pertinent information, while the other side was termed "Attending Physician Statement" and was to be completed and signed by her attending physician.

Although Galbraith did not remember reading Hale's file, she had no reason to disbelieve Dr. Oyer that Hale was suffering from bone pain, fatigue and post-chemotherapy depression.

On May 2, 1997, Provident received Hale's completed initial form requesting residual disability benefits. Hale picked "option three," (the two highest years of earnings in the five years preceding disability—1990 and 1991) to define her PMI. Based on Hale's selection of 1990 and 1991 as her PMI years, her prior monthly income amounted to $17,460. Hale enclosed tax returns with supporting schedules for those

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2 Moore testified that the file indicated Provident had not received Hale's proof of claim dated January 1997 (and encompassing the months of September through

years and also provided her income tax form 1040 for 1995, the year she became disabled, along with a letter explaining that that was the year she had been diagnosed with cancer. January and February attending physician statements were submitted along with the proof of loss. Maslan completed a March attending physician statement shortly thereafter. The April 1997 attending physician statement by psychologist Maslan stated that it was not possible for Hale to work full time. It stated that Hale was suffering from posttraumatic stress reaction and depressive disorder. Maslan's May 1997 attending physician statement is the same and provides diagnosis codes from a standard manual of psychiatric diagnoses—diagnosis code 296.32, and also advises that Hale was "very tired."

On May 6, 1997, after consulting with Provident's accountants, Galbraith wrote to Hale demanding additional information. Hale was required to send full income tax returns for 1992, 1993 and 1994, as well as schedules and attachments to the income tax returns. She was also to provide further required schedules and attachments for the previously provided 1995 income tax form 1040. Because her PMI was based on 1990 and 1991, Hale called Galbraith to question the company's need for the 1992, 1993, 1994 and 1995 additional income tax materials. Hale told Galbraith that it was her understanding that she did not have to provide the additional information based on the disability letter and on the terms of the policy. Galbraith told Hale that the material was required and that if Hale did not provide it, there would be no additional benefits paid. Hale therefore provided all of the required and requested income tax materials to Provident. She also explained to Provident that she had changed offices in November 1993, and her income had dropped in 1994 due to down time from changing offices, failure of the old company to forward her clients to the new office, and increased time she spent letting her past and new clients know where she was. Hale also sent in profit and loss statements from her business on a regular, monthly basis.

December) until March 1997.

On May 22, 1997, Galbraith wrote to Hale, informing her that even though Hale had selected "option three" for figuring her PMI (resulting in a PMI of $17,500) Provident had "revised" her PMI to $1,214. Provident had unilaterally and erroneously decided to use Hale's net income for 1994 as the PMI base. The insurer had concluded on its own that Hale's income loss was attributable to factors other than her disability. Hale testified that when she received this letter she felt "crushed" and "angry." She called Provident and told Galbraith she did not understand their interpretation of the contract or how they had come up with the PMI figure of $1,214. The policy was written for professionals whose incomes fluctuate, that was why they offered the selection choice for PMI, and she had, consistent with the policy, chosen her greatest PMI figure of two successive months within the last five years. She told Galbraith she believed the company was "jerking me around." Galbraith responded, asking Hale whether Hale believed it was "fair that they had to pay me all this money." At that, Hale spoke with Galbraith's supervisor, Richard Leiderman, who told her, "I'm sorry. . . . You're incorrect. We've interpreted the policy correctly and this is basically it." At no time did Leiderman or anyone from Provident tell Hale that Provident had made an error in its PMI calculation. Leiderman did not tell Hale that he would investigate, nor did he tell Hale he would get in touch with her after he had reviewed the file. (Leiderman testified he had spoken to Hale on a call transferred by Galbraith, but did not recall what was said during the call.) After the conversation, Leiderman discussed the matter with Galbraith and upon learning she had used a year other than the two highest years of Hale's earnings to calculate the PMI, he became aware of the error the company had made. Galbraith also testified that she had made an error. She did nothing about it.

On June 2, 1997, Provident sent Hale a letter enclosing a benefit check for March and April of 1997 under a "reservation of rights, until such time as we can complete an evaluation of the claim." The letter also demanded even more detailed financial information. Although Hale had provided many years of tax returns and related schedules, and had provided detailed profit and loss statements for her business, the company demanded she provide copies of "all bank statements, invoices and canceled

checks from January, 1997 to the present." The letter stated that Provident would make no further disability payments until they received all of Hale's banking records and invoices. The company also advised Hale they were going to order "additional medical records." Hale had provided monthly reports from her physicians between January 1997 and throughout the year and she had provided profit and loss statements on a monthly basis between January and June 1997. Provident had also obtained actual medical records from Hale's physicians.

On June 6, 1997, Hale's lawyer, Berta Schweinberger, wrote to Provident, challenging Provident's choice of Hale's lowest income year to calculate benefits for her loss due to disability. Liederman responded that Provident would use Hale's chosen PMI, but would make an adjustment of her benefits for loss not due to disability. Without admitting that Provident had made an error, the Leiderman letter stated that: "Ms. Galbraith's letter of May 22, 1997 was simply trying to quantify this loss of monthly income unrelated to the disability. It would appear, in reviewing the reported income in total for the years 1990 through 1995, the year 1994 is more representational of the actual loss of income related to the disability. And, while Provident is willing to use the PMI of $17,460 it will be necessary for us to make an adjustment on a monthly basis that represents the loss of income unrelated to the disability. Again please note, any loss of income not related to the disability, is not compensable under the terms of the policy." The letter advised Schweinberger that Provident was seeking additional medical records from psychologist Maslan.

It took Hale some months to collect all the additional materials demanded by Provident. She provided Provident with all of her records from December 1996 through November 1997, including all canceled checks, bank statements, business receipts, credit card statements, phone bills, receipts, verification of dues—every business receipt she had and every canceled check she had. Hale needed to hire people to help her compile the financial material. Provident declined to pay Hale residual disability benefits after May 1997.

On June 3, 1997, the day after Provident demanded all of Hale's banking records, canceled checks, and invoices, Provident ordered intense surveillance of Hale. Galbraith testified that Provident wanted to "see what she was doing on a daily basis." Provident ordered that Hale be watched for four days. Galbraith was unaware of any authority allowing her to order a surveillance for a residual disability claim and did not ask anyone if this was appropriate. Investigators videotaped Hale putting things in the trunk of her car and driving away. They provided Provident with the vehicle registrations for the Hales' various cars. Investigators entered the private, gated community in which the Hale family lived and, among other things, observed Hale by the pool in the enclosed backyard of her home. The pool area is not visible from the street; observers conducted their surveillance from a utilities easement.

In July 1997, Provident retained a special agency to investigate Hale's travel, gathering information on airline flights taken by her, even though Hale had told investigator Moffatt of her traveling and although Provident has no rule concerning travel by disabled individuals.

The "additional medical records" sought by Provident in the summer of 1997 were the Maslan process notes. Maslan testified that following her discussion with Moore, she believed Provident had everything it needed from her and was concerned that the summary report she said she believed she had sent had been lost. She had completed the monthly attending physician statement which Hale had given her and returned them to Hale. Hale had forwarded these to Provident on a monthly basis. Maslan had prepared approximately 18 of these reports for Provident between September 1995 to the time of trial.

Provident insisted that it had inadequate medical information to pay benefits because it did not have the Maslan process notes. It took this position, even though it had the attending physician statements from Maslan, actual medical records copied from the office of oncologist Oyer, and reports from Hale's psychiatrist and her other physicians. Dr. Feist, Provident's former medical director and company vice-president testified that decisions were made all the time based on attending physician statements. "We don't

always get all the records." Nor did Provident ever ask for an independent medical examination, as it could have done under the terms of the policy.

On April 24, 1998, after Hale filed her initial complaint, Kymberly Davis, who had taken over the Hale file from Galbraith wrote to Schweinberger, stating that "[b]ased on the information presently available, it appears Ms. Hale does not qualify for residual disability benefits . . . ." Davis asserted that Provident was not disputing Hale's PMI figure, but rather was making an adjustment to the loss of monthly income variable in the formula for the loss of income not caused by the disability, asserting there "has been no proof submitted to support that the predisability loss of earnings prior to 1995 was caused by any disability." Davis also advised that Provident "has had difficulty in obtaining Dr. Maslan's medical records including, but not limited to, clinical notes, examination notes, test results, medication records, and treatment plans. I called Dr. Maslan's office today asking that she provide these records as soon as possible." Nevertheless, Davis asserted that Hale "does not appear to have a loss of monthly income *directly caused by her disability.*" [Italics in original.] The insurer stated it lacked "medical proof to support any ongoing restrictions and limitations from the substantial and material duties of her regular occupation" and there was "[i]neligible or no Loss of Monthly Income caused by the claimed disability." However, the company stated it would give further consideration to her claim if within 30 days it was provided documents including a summary of all Hale's real estate listings from January 1993 to the present; a written explanation of the increase in her business expenses from 1995 to the present; tax returns for 1996 and 1997; and a written explanation outlining Hale's "determination of her monthly loss of earnings *caused* by her disability from January 1, 1997 through present." (Italics in original.)

In 1999, after Hale had filed suit, Provident obtained the Maslan process notes by subpoena and sent them to its consulting psychiatrist Peter Brown, M.D. for analysis. Dr. Brown received the entire file on February 24, 1999, and completed his review the next day. He concluded that Hale was significantly or moderately impaired from May 1997 to October 1998 and that the records supported restrictions and limitations on her

occupation as a real estate agent. In April 1999, Provident paid benefits to Hale for the full period of her residual disability in the amount of $98,724.39. It paid the benefits under a reservation of rights, advising Hale that although it had been able to verify a disabling condition, it was unable to resolve what portion of Hale's income decline was caused by the disability and what part was caused by other factors. Hale returned the checks because Provident had sent them under a reservation of rights.

STATEMENT OF THE CASE

Hale sued Provident on March 31, 1998. The operative second amended complaint was filed on March 18, 1999, and included causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, breach of fiduciary duty, negligent and intentional infliction of emotional distress, invasion of privacy, and various statutorily based causes of action. This second amended complaint was filed against both Provident and Provident Insurance Companies, Inc. Answers were filed on April 16, 1999. Provident Insurance Companies, Inc. was later dismissed from the action.

Before trial, the court granted Provident's motion in limine to exclude evidence of "other claims" against Provident, which Hale contended were relevant to show a "pattern and practice" supporting her theories of breach of the covenant of good faith and fair dealing and fraud, as well as supporting her claim for punitive damages. Following Hale's offer of proof, the trial court ruled the evidence of "other claims" was not relevant, and that any marginal relevance was outweighed by its misleading and prejudicial effect pursuant to Evidence Code section 352. The court also ruled on that basis to exclude the testimony of 12 witnesses about Provident's handling of their claims and refused to allow Hale's expert witness to render an opinion based upon this excluded other claims evidence.

Opening statements were made on June 13, 2000. On June 29, 2000, following the close of evidence, Provident moved in limine for nonsuit/directed verdict.[3] Following extensive argument, the court denied Provident's motions for nonsuit/directed verdict on Hale's causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and invasion of privacy claims The court granted Provident's motion for directed verdict on Hale's causes of action for intentional and negligent infliction of emotional distress and on the issue of punitive damages.

On July 7, 2000, the jury rendered its verdict, finding for plaintiff on her claims for breach of contract, awarding $84,334, negligent misrepresentation, awarding $923,000, and fraud by intentional concealment, awarding damages of $1,500,000.

The jury found in favor of Provident and against Hale on the causes of action for breach of the implied covenant of good faith and fair dealing, for invasion of privacy (finding that while Provident did invade Hale's privacy, she suffered no damages therefrom), and for intentional misrepresentation (finding that while Provident recklessly made a false misrepresentation, it did not do so with the intent to defraud Hale). The court's judgment on special verdicts was filed on July 10, 2000.

On July 24, 2000, Provident moved for judgment notwithstanding the verdict and for a new trial. Among other things, Provident argued there had been juror misconduct as to the negligent misrepresentation verdict, presenting juror declarations that the damages awarded Hale for negligent misrepresentation had included "the total amount of all attorneys fees and all related lawsuit costs that Mrs. Hale incurred . . . ." In an unreported minute order after the September 5, 2000 hearing on new trial and directed verdict motions by both parties, the trial court granted Provident's motion for new trial on the negligent misrepresentation cause of action, but denied Provident's motion for judgment notwithstanding the verdict on that verdict and denied Provident's motions for directed verdict or new trial on the breach of contract and fraud verdicts. The court also denied Hales' various motions for judgment notwithstanding the verdict and for new trial.

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3 For scheduling reasons, Provident's motions were made at the close of both parties' cases and the court therefore treated these motions as combined motions for

Hale appealed and Provident cross-appealed.

PROVIDENT'S CROSS-APPEAL

I.

Substantial evidence supports fraud verdicts.

Provident cross-appeals from the order denying the motion for judgment notwithstanding the verdicts finding fraud (negligent misrepresentation and intentional concealment). It contends there is no substantial evidence of Hale's reliance upon any misrepresentation or concealment.

Well established standards guide our review. "A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. (Code Civ. Proc., § 629.) A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.] [¶] The moving party may appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict, or both. (Code Civ. Proc., § 904.1, subd. (a)(4) [making such an order appealable].) As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion. [Citations.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; accord *Tognazzini v. San Luis Coastal Unified School Dist.* (2002) 86 Cal.App.4th 1053, 1057; *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.)

In order for Hale to prevail, "the record must contain sufficient evidence to support a finding in [her] favor on each and every element which the law requires to support recovery. [Citation.] No matter how overwhelming the proof of some elements of a cause of action, a plaintiff is not entitled to a judgment unless there is sufficient evidence to support all of the requisite elements of the cause of action." (*Beck*

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nonsuit and directed verdict.

Development Co. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1205.)

Reliance is an essential element of Hale's negligent misrepresentation and concealment causes of action. (E.g., *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 402; *Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1408.) "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.] 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell, supra,* at p. 1239.)

The jury was instructed on the reliance requirement. Responding to special verdict forms, the jury specifically found reliance as to both negligent misrepresentation and intentional concealment causes of action. The jury was not asked to specify which conduct they found to be intentional concealment and which they found to be negligent misrepresentation or to specify the conduct by Hale that constituted reliance. Our review of the record discloses substantial evidence of reliance by Hale upon misrepresentations and concealments by Provident.

Initially, we agree with Provident that Hale did not produce sufficient evidence that she relied upon Provident's erroneous initial calculation of her PMI or its nondisclosure of that error as she consistently argued that the two years she had selected were the appropriate years upon which to base the calculation. However, she certainly did rely upon Provident's misrepresentation that it needed the voluminous financial documents it requested to process her claim.

Provident demanded years of income tax returns and schedules, banking records, canceled checks, credit card receipts and other detailed financial information, while failing to reveal that these were unnecessary to support payment of Hale's residual

disability benefits under the option she had chosen and in view of financial information Hale had already supplied. Nevertheless, Hale relied upon Provident's representations that these documents were required when she gathered the documents and sent them to Provident. She further relied by spending money to hire others to help her comply with these demands for further documentation of her finances. She incurred the expense of overnight mail as Provident refused to accept documents via facsimile. This was adequate reliance upon Provident's misrepresentations and concealments to support the verdicts on those causes of action.

Provident contends that because Hale disputed their PMI calculation and hired an attorney to deal with these problems, she did not rely on Provident's representations and concealments. Provident relies upon *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, wherein investors who had successfully sued officers and directors of a financial services company for fraud among other claims, thereafter filed bad faith actions against the company's insurer. The appellate court reversed the trial court judgment for the plaintiffs on the fraud and negligent misrepresentation claims. Among other grounds, the appellate court held that the judgment in plaintiffs' favor on the intentional and negligent misrepresentation claims was erroneous, because the plaintiffs could not establish that they justifiably relied on a falsity with respect to coverage. (*Id.* at pp. 1147-1148.) Although the insurance company made material misrepresentations regarding the availability of coverage under two of its policies and failed to disclose the availability of coverage under one of the policies, the plaintiffs were unable to point to evidence of reliance on those misrepresentation where the insureds disputed the insurer's position on coverage and did not act in reliance on its purported truth. Rather, they filed cross-complaints and demanded full settlement of their claims. The Court of Appeal held: "As a matter of law these actions defeat a finding of reliance. Moreover, Plaintiffs have not pointed to any evidence that the insureds accepted [the insurer's] coverage stance or believed it to be correct." (*Id.* at p. 1148.)

Although superficially similar, the instant case is different in significant respects. In *McLaughlin,* the insureds never relied at all on the misrepresentations. Here, although

appellant never relied upon Provident's PMI misrepresentation or its concealment of the error in its PMI calculations, she manifestly relied upon its increasingly burdensome requests for further financial information. That Hale hired counsel to help her in her dealings with Provident does not negate her reliance upon these misrepresentations and concealments. Nor does the fact that she eventually litigated Provident's refusal to promptly pay her the benefits she was due.

Nor are we persuaded that Hale's reliance is undermined by the fact that she was arguably "required" to supply requested documents to Provident by the terms of her insurance policy. That an insured's actions may be required by law or by the policy do not nullify those actions for purposes of constituting reliance where they are also performed in response to misrepresentations or concealments by the insurer. As recognized by the court in *Agricultural Ins. Co. v. Superior Court, supra,* 70 Cal.App.4th 385, in the context of a discussion of the *insurer's* fraud claim against an insured and its justifiable reliance upon the misrepresentations of the insured: "When a claim is made to an insurer, that insurer's duty of investigation is triggered. [Citation.] Since, the insurer has a legal duty to investigate, it cannot be said that an investigation conducted pursuant to that legal duty is unjustified. Investigations cost money. When a legally required, and hence justified, investigation is conducted into a factually false claim, and the insurer consequently incurs expenses that would otherwise have been unnecessary, the insurer is damaged. . . ." (*Id.* at p. 402.) Similarly, even if Hale were legally required to supply Provident with all the financial information it requested, where such information was not in fact necessary to enable Provident to expeditiously process her claim, but was imposed as part of an effort to wear her down, Hale's compliance constitutes reliance.

Provident also argues that even if it did not need the requested documents to evaluate Hale's claim, at the time she gathered and sent the records, she was receiving benefits under a waiver of premium. Provident cites pages of Hale's testimony that she received a refund of premiums she had paid during the period of her total disability under a waiver of premium provision of the policy. However, that testimony does not indicate

that Provident paid Hale the residual benefits due under her residual policy during the entire time it was demanding financial information it did not require and during the time Hale was making efforts to comply. The record is otherwise. Provident ceased paying benefits after May 1997, demanding on June 2, 1997, to be provided with even more detail documents, including copies of "all bank statements, invoices and cancelled checks from January 1997 to the present." Provident told Hale it would make no more payments until it received all the documents they had requested. Hale complied, although it took her time to do so. Clearly, the refund of premium payments did not establish that Hale was receiving the benefits due her. Nor did it prevent Hale from showing that she relied upon the burdensome financial information requests.

Finally, that Hale testified that she felt "jerked around" by the way she was being treated by Provident does not negate her reliance. Reliance need not be performed either happily or willingly. Rather, the essence of reliance is that the misrepresentation or concealment was an immediate cause of the plaintiff's conduct. The jury could infer that Hale would not have made the effort and undertaken the expense to supply the documents had Provident not misrepresented that it required them to process her claim.

II.

Emotional distress damages in connection with the fraud verdicts.

A. Instructions on emotional distress damages do not constitute reversible error.

Provident next contends reversal of the intentional concealment verdict is required because the court erred in instructing the jury with respect to the possibility of Hale's particular susceptibility to emotional distress. The challenged instructions were given in the context of several specific instructions concerning emotional distress damages. These included instructions number 50 through 55.[4] Specifically, appellant challenges the court's giving of instructions number 52 and 53 as follows:

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4 The court had already instructed the jury that if it found Hale entitled to a verdict against Provident, it must award her damages in an amount that "will reasonably compensate for all the loss suffered by plaintiff and caused by the fraud upon which you base your finding of liability." (Inst. No. 47.) In addition to the challenged instructions, the court also gave the following instructions:

"In measuring the character of defendant's conduct you may consider defendant's knowledge that plaintiff is or may be peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. Defendant may become liable when it proceeds in the face of such knowledge, where it would not be so if defendant did not know." (Inst. No. 52.)

"A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, a plaintiff is entitled to recover damages for any aggravation of such preexisting condition or disability caused by the injury, if the defendant proceeded with the knowledge that plaintiff was peculiarly susceptible to such damages. [¶] This is true even if a condition or disability made plaintiff more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any

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"If you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate plaintiff for all loss or harm, provided that you find it was suffered by plaintiff and was caused by the defendant's conduct. The amount of such award shall include: [¶] Reasonable compensation for any fears, anxiety and other emotional distress suffered by the plaintiff. [¶] No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for emotional distress. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence." (Inst. No. 50.)

"The term 'emotional distress' means mental distress, mental suffering or mental anguish. It includes all highly unpleasant mental reactions, such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain." (Inst. No. 51.)

"You are not permitted to award speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain. [¶] However, if you determine that a party is entitled to recover, you should compensate a party for loss or harm caused by the injury in question which is reasonably certain to be suffered in the future." (Inst. No. 54.)

"You may not award any damages to plaintiff for any alleged emotional distress arising from her participation in this lawsuit." (Inst. No. 55.)

substantial injury. [¶] Where a preexisting condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation." (Inst. No. 53.)

Before instructing the jury, the court had granted Provident's motion for nonsuit/directed verdict as to Hale's causes of action for negligent and intentional infliction of emotional distress on the grounds that there was insufficient evidence of outrageous conduct to allow the issue to go to the jury on these causes of action.

Provident argues that the instructions relating to peculiar susceptibility to emotional distress were erroneous, despite modifications thereto, as they were only appropriate to causes of action for negligent or intentional emotional distress and that once the court granted the nonsuit the two infliction of emotional distress causes of action, it was error for the court to give either instruction number 52 or 53.

At the outset we observe the distinction between *causes of action* for intentional and negligent emotional distress and emotional distress *damages* recoverable as compensatory damages for intentionally tortious conduct, where proven. (See e.g., Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2001) ¶¶ 11:95, 13:75 et. seq. (hereafter Croskey).) The proof required for recovery of emotional distress damages varies depending on the tort theory involved. (*Id.* at ¶ 13:78.)

Emotional distress damages are not generally available on contract claims, but are available as compensatory damages for intentional tortious conduct (including intentional concealment). (Croskey, *supra*, ¶¶ 13:85, 13:69-1370; see e.g., *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908 [plaintiff could recover compensation for pain, suffering and emotional distress caused by defendant's wrongful conduct in an action for fraudulent misrepresentation and failure to disclose].) Where a tort theory of recovery is proved, the insured's damages are no longer limited to contract damages, but are subject to the tort measure, that is "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (Civ. Code, § 3333; see e.g., Croskey, *supra,* at ¶¶ 11:22, 13:69; *Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 433.)

Extracontractual compensatory damages recoverable on insurance bad faith causes of action similarly include economic losses and resulting emotional distress. (Croskey, *supra*, at ¶¶ 13:70, 13:75.) They are available without proof that the defendant's conduct is extreme or outrageous. (*Id.* at ¶ 1380.) "To recover emotional distress damages in an action for tortious breach of the implied covenant, plaintiff need not plead or prove outrageous conduct, 'severe' emotional distress, or an intent on the part of the insurer to cause emotional distress. Provided the bad faith conduct has caused *economic loss,* emotional distress damages are recoverable in a 'bad faith' action—*independent* of the tort of intentional infliction of emotional distress. [Citations.]" (Croskey, *supra*, at ¶ 11:93, italics in original, citing *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 580; *Pershing Park Villas Homeowners Association v. United Pacific Ins. Co.* (9th Cir. 2000) 219 F.3d 895, 903-904.)

The case went to the jury on both a bad faith breach of the covenant claim and fraud-intentional concealment claim.[5] Emotional distress damages were recoverable under both causes of action.

Provident's attorney acknowledged the distinction between the availability of emotional distress damages for the breach of the covenant of good faith and fair dealing and the maintenance of separate causes of action for negligent and intentional infliction of emotional distress, when he argued "the emotional distress that is caused by a claim denial may or may not be a basis for damages under a bad faith claim for relief. But it's not sufficient to allow intentional or negligent infliction of emotional distress to proceed." Counsel urged that emotional distress damages might be available for breach of the covenant, "but not as a separate tort for intentional or negligent infliction of emotional distress, unless the Court finds the requisite proof of outrageous conduct, disregard of the probability of causing emotional distress, severe and emotional distress that was actually suffered, and causation."

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5 It also went to the jury on a negligent misrepresentation cause of action. However, damages for emotional distress generally are not recoverable in negligent misrepresentation cases. (Croskey, *supra,* ¶ 13:85; see *Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 799-800.)

BAJI No. 12.76 ("Susceptibility of Plaintiff") provided the template for Instruction No. 52. Although BAJI No. 12.76 with its reference to "extreme and outrageous conduct" is appropriate for the intentional infliction of emotional distress cause of action, as modified by the court here to eliminate the "extreme and outrageous" conduct requirement, the instruction does no more than advise the jury that it may consider the defendant's knowledge of any peculiar susceptibility of the plaintiff to emotional distress when evaluating the defendant's conduct. Such an instruction is a correct statement of the law with respect to both the causes of action for breach of the covenant of good faith and fair dealing and the cause of action for intentional concealment.

"*A tortfeasor 'takes his victim as he finds him*' . . . so an insurer cannot escape liability for the insured's emotional distress resulting from the insurer's failure to pay benefits, although a wealthier person might not have been so upset: 'Defendants urge that (plaintiff's) emotional distress . . . resulted not from their conduct but from plaintiff's unfortunate economic situation. This argument goes to the question of causation . . .' and causation is a question of fact for the jury. (Croskey, *supra,* at ¶ 13:90, citing *Fletcher v. Western National Life Ins. Co.,* (1970) 10 Cal.App.3d 376, 398, italics added.) Analogously, although an insurer's tortious conduct might not cause emotional distress in a healthy insured, it is a jury question whether the insured's conduct caused plaintiff's emotional distress.

Provident argues that BAJI No.12.76 is *only* appropriate for intentional infliction of emotional distress causes of action. None of the cases cited so holds. Rather, the question is not presented. The cited cases, *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148*, Cochran v. Cochran* (1998) 65 Cal.App.4th 488, and *Carter v. Cangello* (1980) 105 Cal.App.3d 348, describe the elements required for pleading and proving a cause of action for intentional infliction of emotional distress, taking into account the defendant's knowledge of the plaintiff's peculiar susceptibility. [6] Nowhere do they

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6 *Cole v. Fair Oaks Fire Protection Dist., supra,* 43 Cal.3d 148, addressed the question whether the exclusive remedy provisions of the workers compensation act precluded a cause of action for intentional infliction of emotional distress. In reciting the elements of a cause of action for intentional infliction of emotional distress, and what

indicate that a jury may *not* take into account the defendant's knowledge of the plaintiff's particular vulnerability or susceptibility in evaluating whether the conduct of the defendant constituted "bad faith" or in determining whether the defendant intentionally concealed or suppressed a material fact with the intent to defraud the plaintiff.

Nor do we agree that the instruction lowered the plaintiff's burden of proof by permitting the jury to award emotional distress damages based only on an inference that Hale possibly suffered from a peculiar susceptibility to emotional distress. The instructions as a whole advised the jury that any emotional distress must have been *caused* by the conduct for which it had found Provident liable. (Inst. Nos. 47, 50, 54.) Indeed, the jury was expressly told it could not award damages for emotional distress which was not caused by Provident. (Inst. No. 53.)

Challenged Instruction No. 53 is a fusion of BAJI Nos. 12:76 and 14.65. BAJI No. 14.65 states a traditional measure of damages for tortious conduct where the defendant's tortious conduct aggravates a preexisting condition of the plaintiff. It is not a liability instruction, but an instruction on *damages*. As given here, Instruction No. 53 in effect correctly informed the jury that Hale was *not* entitled to award damages for physical or mental distress due to the cancer or its aftermath. Only if Provident's tortious conduct worsened or added to Hale's mental distress, would she be entitled to damages

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might constitute outrageous conduct, the court observed, "Behavior may be considered outrageous if a defendant . . . knows the plaintiff is susceptible to injuries through mental distress; or . . . acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Id.* at p. 156, fn. 7, citations omitted.)

Carter v. Cangello, supra, 105 Cal.App.3d 348, rejected the plaintiffs' argument that they should be allowed to proceed to trial on a cause of action for intentional infliction of emotional distress under the principles of *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 recognizing behavior as outrageous where the employer was aware of the employee's peculiar susceptibility to emotional distress. Plaintiffs had not alleged they were peculiarly susceptible to emotional distress or that the defendant was aware of that fact. (*Id.* at pp. 350-351.)

In *Cochran v. Cochran, supra*, 65 Cal.App.4th 488, the court recited the elements of a cause of action for intentional infliction of emotional distress and found the conduct

for that added mental suffering. However, the court modified the instruction to include as an additional requisite, the component of the defendant's knowledge of the plaintiff's susceptibility. To the extent the instruction added an element that the defendant must *know* of the plaintiff's peculiar susceptibility, before she could recover damages for any additional mental suffering caused by Provident, that addition did not *lower* the plaintiff's burden of proof as Provident argues. Rather, it *increased* Hale's burden of proof, by requiring her to show not only that Provident acted wrongly (either breaching its covenant of good faith and fair dealing and/or intentionally concealing material information from her), causing her damages, but also that Provident *knew* of her increased susceptibility to emotional distress when it acted. Any error in this respect could not have prejudiced Provident and was clearly harmless.

B. Substantial evidence supports the award of emotional distress damages.

Provident also contends that Hale failed to sustain her burden to prove actual emotional distress damages. We disagree.

A damages award cannot be based solely on conjecture or speculation. There must be competent proof of emotional distress suffered by the insured. (*Austero v. Washington National Ins. Co.* (1982) 132 Cal.App.3d 408, 417, disapproved on another ground in *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816-817.) However, testimony of the plaintiff alone will suffice. (*Tan Jay International, Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 708.) Nor need plaintiff have suffered traumatic emotional distress: "[T]he requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (*Fletcher v. Western National Life Ins. Co., supra,* 10 Cal.App.3d at p. 397.)

Hale testified about her distress upon receiving the March 22 letter from Provident, advising her that the loss of income was not due to disability and that

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alleged did not meet the requisite extreme and outrageous requirement, despite allegations of peculiar susceptibility of the plaintiffs.

Provident had revised her PMI. She stated: "I can't even express how I felt when I received this letter. I was angry. I felt crushed."[7] She also testified, "I felt that they were, quote, jerking me around." Although elicited by questions involving the letter relaying Provident's PMI calculation, the jury could properly infer without undue speculation that these emotions were not solely limited to her reactions to the specific letter, but related to the entire spectrum of Provident's conduct. Indeed, Erica Maslan testified that Hale had talked to her "about a level of stress, I would say, or distress, over having to produce seven years worth of bank documents."

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7 The court sustained Provident's hearsay objection to a subsequent portion of Hale's answer and struck the answer. We disagree with Provident that the court struck appellant's entire answer. In its entirety, the exchange proceeded as follows:

"Q When you received this letter, how did you feel?

"A I can't even express how I felt when I received this letter. I was angry. I felt crushed. [¶] I had worked all my life. I sacrificed. I worked hard to be where I was in my profession. I sacrificed time with my family. I sacrificed time with my friends. You do not get where you are without working a tremendous amount of hours. [¶] And when you're battling, trying to get healthy, and you're telling a company you're going back to your work, and your doctors are telling you not to go back to work—

"MR. HERLIHY*:* objection, Your Honor. Hearsay.

"THE COURT*:* Sustained.

"MR. HERLIHY*:* Motion to strike.

"THE COURT*:* The answer's stricken. The jury's admonished to disregard." (Italics omitted.)

During post-trial motions, the trial judge disagreed with Provident's view of the ruling as striking all of Hale's testimony. The court ruled: "[The] court disagrees with defendant's analysis that plaintiff's entire testimony regarding her emotional distress was stricken by the court. Defendant's objection was properly one of hearsay as to what plaintiff told her company and what her doctors told her. [Citation.] It would have been error for the court to strike all of plaintiff's testimony as it was not all hearsay. The portion stricken by the court was that to which defendant objected—that is the hearsay. [¶] Assuming arguendo defendant is correct, that plaintiff's failure to clarify the record left all of the testimony stricken, the court agrees with plaintiff that from the totality of plaintiff's testimony, there was substantial evidence to support the jury's verdict."

We agree with the trial court. As the objection was sustained on hearsay grounds, only that portion of the answer was stricken. To the extent the record may be ambiguous as to precisely how much of Hale's answer was stricken, we believe that determination was for the trial court.

The foregoing constitutes ample evidence to support the award of the emotional distress damages awarded here.

III.

Damages for negligent misrepresentation.

Provident contends that *as a matter of law* Hale was not entitled to any damages on her negligent misrepresentation cause of action and that the court erred in denying Provident's motion for judgment notwithstanding the verdict on that cause of action.

The jury awarded Hale $923,000 damages on her cause of action for negligent misrepresentation. The trial court granted Provident's motion for new trial based on juror misconduct as to this cause of action, but denied Provident's motion for judgment notwithstanding the verdict. The court found jury misconduct permeated the verdict on this cause of action making it excessive, as the jury included in their award for negligent misrepresentation attorney fees and related lawsuit fees and costs they estimated Hale incurred in bringing the lawsuit, although no evidence of such fees had been presented. Hale does not challenge the grant of a new trial on this cause of action.

Arguing that damages for negligent misconduct are not recoverable here, Provident asserts: (1) the jury had already awarded Hale damages for breach of contract, and could not award policy benefits twice; (2) emotional distress damages were unavailable for negligent misrepresentation, absent physical injury; and (3) Hale was not entitled to an award of attorney fees as damages pursuant to *Brandt v. Superior Court, supra,* 37 Cal.3d 813 (*Brandt*) as she did not prevail on her bad faith claim and because there was no evidence before the jury as to such fees.

We start with the proposition that regardless of the theories advanced, a plaintiff is entitled to no more than a single recovery. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159; *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 554-555.) Consequently, Hale could not recover the same policy benefits twice. Nor does it appear she did.

A. Provident argues, for the first time on this appeal, that emotional distress damages are not recoverable as a matter of law for negligent misrepresentation. Provident moved

for directed verdict and for judgment notwithstanding the verdict on the fraud causes of action contending there was insufficient evidence of emotional distress. It never claimed below that emotional distress damages could not be awarded on a cause of action for negligent misrepresentation. "As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried." (Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs (TRG 2001) ¶ 8:229, citing *Earnst v. Searle* (1933) 218 Cal. 233, 240-241; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316-1317.) However, the issue appears to raise a question of law, and we may exercise our discretion to consider a new theory on a pure question of law. (*Resolution Trust Corp. v. Winslow* (1992) 9 Cal.App.4th 1799, 1810-1811; Eisenberg, *supra,* ¶ 8:240.1.) Because the issue will doubtless be raised by Provident on any retrial of the negligent misrepresentation cause of action, it makes sense to resolve it now.

We agree with Provident that emotional distress damages were not recoverable on the cause of action for negligent misrepresentation. Although emotional distress damages may be recoverable where there is intentional fraud, "such damages generally are *not* recoverable in *negligent* misrepresentation cases, at least where the only other loss is economic in character." (Croskey, *supra*, ¶ 13:85, italics in original, citing *Branch v. Homefed Bank, supra,* 6 Cal.App.4th 793, 799.)

Hale argues that she is entitled to compensation for her entire loss and that limitations on recovery of emotional distress damages do not apply to cases of fraud by a fiduciary or quasi-fiduciary such as her insurer. However, the cases she relies upon to support the exception to the general rule uniformly involve *intentional* tortious conduct or breach of the covenant of good faith and fair dealing. Relying upon dicta in *Branch v. Homefed Bank, supra,* 6 Cal.App.4th 793 (*Branch*), Hale argues that in cases involving insurers as fiduciaries or quasi fiduciaries, emotional distress recovery for negligent conduct has been approved.

In *Branch,* the appellate court reversed an award for emotional distress damages in the plaintiff employee's action for negligent misrepresentation against a bank arising out

of misrepresentations inducing him to leave his former employment and accept a job with the bank. The court relied upon "settled law, namely that damages for emotional distress are ordinarily not recoverable in an action for negligent misrepresentation when the injury other than the emotional distress is only economic." (*Id.* at p. 798.) The court stated that the "critical analysis is the determination that the tort is either intentional or negligent, rather than the selection of the simple definitional label of the misrepresentation as 'deceit.' " (*Id.* at p. 799.) Acknowledging that Civil Code section 3333 provides the measure for non-contract damages as "' "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not" ' " (*id.* at p. 800), the court also recognized that " 'California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff or intentional wrongdoing by defendant. Damages for emotional suffering are allowed when the tortfeasor's conduct, although negligent as a matter of law, contains elements of intentional malfeasance or bad faith.' [Citation.]" (*Id.* at p. 800, quoting *Quezada v. Hart* (1977) 67 Cal.App.3d 754, 761.) However, the *Branch* court also recognized that "[r]ecovery of emotional distress damages has been allowed, absent impact or physical injury, in certain specialized classes of cases. . . . Recovery has . . . been allowed when the negligence arises in a situation involving breach of fiduciary or quasi-fiduciary duties, as in bad faith refusal to pay insurance proceeds. (*Crisci v. Security Ins. Co. of New Haven, Conn., supra,* 66 Cal.2d 425 . . . ; *Gruenberg v. Aetna Ins. Co., supra,* 9 Cal.3d 566 . . . ; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 Cal.App.3d 917 . . . .)" (*Id.* at p. 800.)

The cases cited by *Branch* as support for its statement that emotional distress damages may be recovered where the negligent conduct involved breach of fiduciary or quasi-fiduciary duties *all* involved elements of intentional misconduct or bad faith. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1040.) *Branch* itself held the employee plaintiff's case did not fall into any of the exceptions to the general rule. In the absence of physical impact or injury, he could not base emotional distress damages upon the bank's negligent misrepresentations. (*Id.* at pp. 800-801.)

Nor does *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012 (*Sprague*), which Hale asserts is "virtually on all fours" with her situation, assist her. Nowhere does the case indicate that negligent misrepresentation suffices to support an emotional distress recovery where the only other injury is economic. In *Sprague*, the plaintiff brought an action on his disability insurance policy alleging that the insurer, the company's claims adjuster, a company providing investigation and medical examinations to insurers, an employee of this service company, and the doctor selected by the company to examine the plaintiff *had engaged in a conspiracy* to fraudulently deny the plaintiff insurance benefits. (*Id.* at pp. 1020, 1128-1129.) The plaintiff settled with the insurer, the claims adjuster and the doctor and the jury returned a verdict against the insurance service company. Among other things, the appellants contended on appeal that the jury was erroneously allowed to consider the plaintiff's claim that he continued to suffer mental distress even after his disability insurance benefits were conditionally restored. The court held that "[a]n award of damages for emotional distress resulting from tortious termination of disability insurance benefits is not limited as a matter of law to the time during which the economic harm continues totally unabated. Those cases which have allowed emotional distress as an element of damages resulting from tortious breach of insurance contracts have required economic harm only to ensure, as a threshold matter, that an actual wrong has been committed against plaintiff." (*Id.* at p. 1030.) The court concluded that "plaintiff was entitled to recover for his continuing mental suffering." Although the case was not brought on a theory of bad faith breach of the covenant of good faith and fair dealing, it is clear that [plaintiff's] cause of action for conspiracy to fraudulently deny him insurance benefits was grounded in intentional conduct by the defendants. Indeed, the appellate court found substantial evidence that appellant had knowledge that the "purpose in requiring medical examination was to fraudulently terminate plaintiff's benefits, and acted to ensure that result." (*Id.* at p. 1028.)

We conclude that Hale could not recover emotional distress damages on her cause of action for negligent misrepresentation where the only other injury she suffered was economic.

B. We also agree with Provident that *Brandt* fees are not recoverable as a component of damages for negligent misrepresentation.

"*In Brandt* . . . , the Supreme Court held that attorney fees, 'reasonably incurred to compel payment of the policy benefits,' are recoverable as an element of the damages in a bad faith action. (*Id*. at p. 815.) The court cautioned that the recoverable fees do not extend to fees incurred in pursuing the bad faith action itself: 'The fees recoverable, however, may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable.' (*Id*. at p. 819.) The determination of the amount of fees must be made by the trier of fact, generally the jury. Where the action includes both a contract claim for benefits, and a tort bad faith claim, the Supreme Court in *Brandt* encouraged parties to stipulate to 'postjudgment allocation and award by the trial court . . . since the determination then would be made after completion of the legal services [citation], and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services.' (*Id*. at pp. 819-820.)" (*Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 571-572.)

Although *Brandt* contains language suggesting that legal fees incurred as a result of "tortious conduct" may be recoverable damages, it is doubtful that the Supreme Court meant this to apply where the tort does not involve withholding benefits due under the insurance policy. (Croskey, *supra,* ¶ 13:125.) *Brandt* itself arose in the context of the tort of breach of the implied covenant of good faith and fair dealing, and referred repeatedly to that cause of action and to "bad faith" and unreasonable conduct of the insurer in withholding benefits. (See, e.g., *Campbell v. Cal-Gard Surety Services, Inc., supra,* at pp. 817-819.) Subsequent cases have interpreted *Brandt* as limited to the context of bad faith withholding of benefits due under a contract. (See *Fuhrman v. California Satellite Systems* (1986) 179 Cal.App.3d 408, 426-427, disapproved on another ground in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219.) In *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1 our Supreme Court cited *Brandt* as "allowing

attorney fees for tortious breach of insurance contract." (*Id.* at p. 15.) We have not been cited to a single case, and we have found none, awarding *Brandt* fees in the insurance context as damages for causes of action other than breach of the covenant of good faith and fair dealing. The courts have been unwilling to stretch the holding of *Brandt* beyond it's specific context. (Cf., *United Services Automobile Assn. v . Dalrymple* (1991) 232 Cal.App.3d 182, 186-187 [a necessary predicate to the award of *Brandt* fees in a declaratory relief action is a finding of the insurer's bad faith breach of the covenant]; *Burnaby v. Standard Fire Ins. Co.* (1996) 40 Cal.App.4th 787, 795-796 ["when fees are recovered at trial as an item of damages in an action for the tortious breach of the implied covenant of good faith and fair dealing (as in *Brandt*), they are *not* recoverable on appeal."]. (Italics in original.)

As we determine that Hale could not recover *Brandt* fees on her negligent misrepresentation cause of action, we need not address Provident's additional contention that she failed to introduce evidence of such fees.[8]

C. Despite our determination that neither emotional distress damages nor *Brandt* fees would be available to Hale upon the retrial of her negligent misrepresentation cause of action, we conclude the court did not err in denying Provident judgment notwithstanding the verdict on the negligent misrepresentation claim. As discussed above, Hale introduced evidence that she incurred expenses occasioned by Provident's intentional concealment and negligent misrepresentation when she gathered and sent additional detailed financial information to Provident, beyond that required to process her claim. Although relatively small in amount, she was entitled to recover these sums as damages on the jury's finding of negligent misrepresentation.

Moreover, we observe that although neither damages for emotional distress nor *Brandt* fees are recoverable in connection with Hale's cause of action for negligent infliction of emotional distress, both such damages *may be* recovered on retrial of her cause of action for breach of the implied covenant of good faith and fair dealing should

the properly instructed jury find for Hale on that cause of action. (See discussion in part V., post.)

IV.

Substantial evidence supports breach of contract verdict.

Provident next argues that the breach of contract verdict is not supported by substantial evidence. We disagree. Provident had no contractual duty to provide residual benefits until presented with an adequate proof of claim. However, substantial evidence supported the jury's determination that Hale had provided adequate proof of claim during the time Provident had suspended benefits. Provident restates on appeal its argument made at trial that it could not properly evaluate whether Hale's loss was due to disability without the Maslan process notes and that the financial information it had indicated Hale's loss was not due to her disability. Clearly, the jury disagreed. Provident did not promptly pay sums due on the disability claim, but withheld payments for months, while it sought ever more burdensome and unnecessary detailed financial information. It also asserted that it needed additional medical records from Maslan. When Provident did finally pay Hale her disability benefits, it did so under reservation of rights, threatening to require repayment. Hale presented evidence that the proofs of claim she regularly had submitted and the financial statements she provided were adequate to support her claim for residual benefits. The evidence amply supported the breach of contract verdict.

HALE'S APPEAL

V.

Instructional error requires reversal and retrial of Hale's claim for breach of the covenant of good faith and fair dealing.

Over Hale's objection, the trial court instructed the jury that "An insured's deliberate delay or refusal to cooperate with the insurance company may constitute a defense to a bad faith action against the insurer." Hale contends this instruction was error

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8 However, we note the trial court bifurcated the attorney fee issue so that it would be tried separately in the event that Hale prevailed on her cause of action for breach of

as directly contrary to the Supreme Court's holding in *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390 (*Kransco*) and that she was prejudiced by the error. Provident counters that the instruction is a correct statement of the law and that in any event, Hale has failed to demonstrate prejudice.

A. We begin with *Kransco*. In that third party bad faith action, the insurer who had breached the covenant of good faith and fair dealing by failing to settle a third party action within policy limits raised the insured's comparative bad faith as an affirmative defense, arguing that the insured's litigation misconduct contributed to the amount of the verdict in excess of the policy limits. (*Id.* at pp. 401-402.) The Supreme Court held that an insured's comparative bad faith may not be asserted as an affirmative defense in a bad faith action brought against the insurer by its insured for breach of the covenant of good faith and fair dealing. (*Ibid.*) The court explained: "To be sure, the 'duty of good faith and fair dealing in an insurance policy is a two-way street, running from the insured to his insurer as well as vice versa.' [Citation.] *But the scope of the insured's duty of good faith and fair dealing, and the remedies available to the insurer for a breach of that duty, are fundamentally and conceptually distinct from the insurer's reciprocal duty, and the remedies available to the insured for breach of that duty, under the insurance policy. As this court has explained, it is an insurer's breach of the covenant of good faith that is governed by tort principles, at least as concerns the availability of tort damages.* [Citation.] *In contrast, an insured's breach of the covenant is not a tort.* [Citation.] *An insurer's tort liability is predicated upon special factors inapplicable to the insured*. [Citations.]" (*Id.* at p. 402, italics in original.)

Kransco disapproved "[t]o the extent it is inconsistent with the conclusions reached herein" (*id.* at p 407, fn. 11) *California Casualty Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274 (*California Casualty*), which had held that the insurer could raise the comparative fault of the insured as an affirmative defense in a bad faith action by the insured against it. (*Kransco, supra,* at p. 404.) Instead, the Supreme Court in

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the covenant of good faith and fair dealing.

Kransco embraced the Court of Appeal decision *Agricultural Ins. Co. v. Superior Court, supra,* 70 Cal.App.4th 385 (*Agricultural*), a bad faith action arising out of an insurance claim for earthquake damage. The insurer paid part of the claim, but after further investigation asserted a cross-complaint contending the insured's claim was in significant part falsified and pleading that the insured had breached the covenant of good faith and fair dealing. (*Id.* at p. 389; *Kransco, supra,* at p. 405.) In rejecting that claim, "the *Agricultural* court explained: 'An insurer has no claim against its insured in tort for breach of the covenant of good faith and fair dealing. A breach of this covenant is, at base, a breach of contract. . . .'" (*Ibid.,* quoting *Agricultural, supra,* at p. 389.) The Supreme Court concluded: "We agree with the analysis and holding in *Agricultural,* and disagree with the *California Casualty* court's extension of tort comparative fault principles to an insured's contractual breach of the covenant of good faith and fair dealing. By allowing an insurer to assert a defense of comparative bad faith, *California Casualty's* holding misleadingly equates an insured's contractual breach of the reciprocal covenant of good faith and fair dealing with an insurer's tortious breach of the covenant. The holding is confusing and inconsistent insofar as it acknowledges an insured's breach of the covenant is not actionable in tort, but nonetheless can give rise to tort consequences because the insurer may assert it as a defense in a bad faith action to lessen responsibility for its own conduct." (*Id.* at pp. 406-407, fn. omitted.)

Kransco emphasized that "rejection of comparative bad faith in this context does not leave the insurer without remedies for an insured's breach of the covenant of good faith and fair dealing." (*Id.* at p. 408.) "Evidence of the insured's misconduct or breach of its express obligations under the terms of the insurance policy (i.e., breach of the cooperation clause) may support a number of contract defenses to a bad faith action, by voiding coverage, *factually disproving the insurer's bad faith by showing the insurer acted reasonably under the circumstances*, or forming the basis for a separate contract claim, and an insured's intentionally fraudulent conduct may give rise to tort damages. (*Ante,* at p. 408.) *An insurer may not, however, assert an insured's comparative bad faith*

as an affirmative defense to partially absolve itself of its own tort liability for breach of the covenant of good faith and fair dealing." (*Id.* at pp. 410-411, italics added.)

Provident attempts to cabin *Kransco* as applying only to third party actions wherein comparative bad faith is raised as a partial defense. While some commentators appear to read *Kransco* as refusing to extend the comparative negligence doctrine which may be applicable to first party insurance cases to a third party insurer sued by its insured for bad faith failure to settle (see, Com. to BAJI No. 1292 (9th ed. 2002)[9]; 4 Cal. Civ. Prac. Torts (April 2002) §§ 40:22), other commentators acknowledge that *Kransco's* reasoning applies with equal force to first party bad faith actions where the insured's alleged bad faith or comparative negligence occurs within the contractual relationship of the parties. (See Croskey, *supra,* ¶¶ 12;124, 12:814, 12:817; 12:1171, 12:1172; 12:1175, 12:1183; 4 Cal. Civ. Prac. Torts, *supra*, § 41:21 [the Supreme Court "has held that an insurer cannot assert the comparative bad faith of its insured as an affirmative defense in a bad faith action brought against it by its insured for breach of the covenant of good faith and fair dealing. [Citation.] Prior to the Supreme Court's opinion in *Kransco,* there had been a conflict within the Court of Appeal as to whether the covenant of good faith and fair dealing applied to insureds as well as insurers. . . . The Supreme Court disapproved *California Casualty* and affirmed the *Kransco* appellate court"].)

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9 The Comment to BAJI No. 12.92 "Bad Faith—Elements of Claim for Withholding Payment of Benefits" states in relevant part that "[t]he doctrine of comparative fault may apply in some types of first party bad faith actions. (*Patrick v. Maryland Casualty Co.* (1st Dist. 1990) 217 Cal.App.3d 1566 . . . .) [¶] However, in *Kransco* . . . , the court held that in third party bad faith litigation (failure to settle within policy limits) comparative bad faith cannot be asserted as a defense when the misconduct by the insured occurred in the conduct of the underlying trial. To the extent that it was inconsistent with the conclusions of this case, *California Casualty* . . . was disapproved. The latter was a first party bad faith claim arising from an uninsured motorist policy provision. The insured was accused of having acted in bad faith in the prosecuting, handling and management of the uninsured motorist claim. [¶] However, the court declined to comment upon *Patrick v. Maryland Casualty Co., supra,* 217 Cal.App.3d 1566, specifying that the *Patrick* case was clearly distinguishable because it was a first party bad faith matter, and the purported negligence of the insured was outside the contractual relationship of the parties."

Kransco refused to directly address the continuing vitality of *Patrick v. Maryland Casualty Co., supra,* 217 Cal.App.3d 1566 (*Patrick*). In that case the doctrine of comparative negligence was applied to a first party insurance case wherein the insured sued his insurer for bad faith delay in paying his homeowners insurance claim for a storm-damaged roof and the insured included as damages personal injuries suffered when he fell off the roof after tiring of the insurer's delay and undertaking repairs himself. (*Kransco, supra,* at pp. 411-412.) However, the *Kransco* court did observe that the negligent acts of the insured—"walking backwards on a roof while dragging a heavy sheet of plywood, patently the proximate cause of the insured's injuries when he fell from the roof—were *outside the contractual relationship of the parties*. (*Id.* at pp. 1569-1570.)" (*Id.* at p. 412, italics added.) *Kransco* thus suggests that any continuing vitality to the comparative negligence analysis of *Patrick* be limited to conduct occurring outside the contractual relationship of the parties.

In the instant case, Hale's alleged refusal to cooperate with Provident in supplying information went to the heart of the contractual relationship. "The insured's failure to comply with policy terms (e.g., to furnish proof of loss, to cooperate in investigation, etc.) does not negate the insurer's implied covenant of good faith and fair dealing. The insurer's implied covenant obligation 'is unconditional and independent of the performance of plaintiff's contractual obligations' [Citation.]" (Croskey, *supra,* ¶ 12:814, quoting *Gruenberg v. Aetna Ins. Co., supra,* 9 Cal.3d 566, 578.) "The insured's breach of the implied covenant, being contractual in nature . . . , *cannot* be used as an offset or defense to an action against the insurer for tortious breach of the implied covenant. [Citation.]" (Croskey, *supra,* ¶ 12:817, italics in original, citing *Kransco, supra,* at pp. 405-406.)

We believe *Kransco's* rationale applies as fully in the first party context as it does in the third party duty to defend context. Moreover, both *California Casualty,* which the Supreme Court found flawed and *Agricultural*, the reasoning of which the court embraced, were first party cases. Instruction No. 34 given here did not *compel* the jury to find that a deliberate delay or refusal to cooperate by Hale was a defense to a bad faith

breach of the covenant by Provident. Nevertheless, it *allowed* the jury to do so, contrary to the teaching of *Kransco*.

Provident asserts that *Kransco* is distinguishable because it did not involve the assertion of the insured's comparative bad faith or comparative negligence as a partial defense. If the insured's comparative bad faith cannot be asserted as even a partial defense, we fail to see how it can be asserted as a *complete* defense to the insurer's bad faith.

Nor did the instruction here simply and correctly advise the jury that Hale's alleged refusal to cooperate with Provident was a factor it could use in determining whether Provident acted reasonably under the circumstances. Rather, the instruction effectively told the jury that *even if* it found Provident's conduct to be in bad faith and a breach of the covenant of good faith and fair dealing, Hale's deliberate delay or failure to cooperate with Provident could constitute a complete defense to such liability. *Kransco* expressly acknowledged that while the insured's bad faith refusal to cooperate with the insurer is a circumstance to be considered in determining whether the insurer acted reasonably in its handling of the insured's claim, such conduct may not be asserted by the insurer as a *defense* to the insured's bad faith action against it. (*Id.* at pp. 410-411.)

We conclude that *Kransco* does not permit the insurer to assert the insured's breach of contractual covenants, such as the duty to cooperate, as a defense to the insured's tort cause of action for breach of the covenant of good faith and fair dealing. The instruction here was clearly erroneous.

B. Provident argues that if erroneous, the instruction did not prejudice Hale. In evaluating instructional error, we do not apply a per se reversal rule. The Supreme Court has considered and rejected the theory that an instructional error in a civil case may be inherently prejudicial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-580 (*Soule*); accord *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 (*Rutherford*).) Instead, *Soule* held, "instructional error requires reversal only ' "where it seems probable" that the error "prejudicially affected the verdict" ' (*Id.* at p. 580.) The reviewing court should consider not only the nature of the error, 'including its natural and

probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' (*Id.* at pp. 580-581.)" (*Rutherford, supra,* at p. 983.) The party complaining of the instructional error must demonstrate a miscarriage of justice arose from the erroneous instruction. (See *id.* at p. 983.)

The nature of the instructional error here is such that it is unlikely to have impaired Hale's ability to put its full case before the jury. (See *Rutherford, supra,* at pp. 983-984.) No relevant evidence was excluded because of the instruction. The instruction by its nature did not preclude Hale from presenting any evidence it possessed on the question of Provident's breach of the covenant or Hale's own conduct in responding to Provident's requests for further information. However, this factor is not determinative here. "Nowhere did *Rutherford* suggest it was adding an additional factor to the *Soule* formulation." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 397.) If the instruction did lead to exclusion of relevant evidence, "that would certainly add weight to the prejudice side of the scale. But the fact that an erroneous instruction *did not* result in the exclusion of evidence adds nothing to a finding of harmlessness. For this reason, and because *Rutherford* relied on other factors to find the error harmless, *Rutherford* avails [respondent] naught." (*Ibid.*, italics in original.)

There was a high degree of conflict in the evidence as to whether Provident's conduct amounted to reasonable investigation and whether Hale's failure to promptly turn over all requested financial records and the Maslan process notes made Provident's conduct reasonable under all the circumstances. Maslan's refusal to turn over her notes was a keystone to Provident's argument that it required further medical information documenting Hale's disability to enable it to determine whether Hale's income drop was related to her disability and that it had acted reasonably in light of the information it had at the time.

Provident argues the instruction could not have been prejudicial because there was no "comparative bad faith" issue in the case. This reasoning is specious. As discussed above, the error in the instruction is not that it advises the jury it may offset Hale's comparative liability against Provident's bad faith, but that it advises that Hale's failure to cooperate may be a complete defense to her bad faith breach of the covenant claim.

There were no instructions which specifically remedied the error. Provident argues that Instruction No. 38 ameliorated any error. Instruction No. 38 stated, "If defendant breached the implied covenant of good faith and fair dealing, you will award plaintiff such damages as were caused to plaintiff by such breach. Such damages must include: value of the loss of benefits and emotional distress." Again, Provident anchors its argument in its assertion that the instructional error here related to comparative bad faith. Instruction No. 38 advising the jury upon the *damages* to be awarded for a breach of the implied covenant, could not have remedied the defect in Instruction No. 34 which went to factors considered in determining *liability* for bad faith. Finding no liability, the jury never considered the damages issue to which Instruction No. 38 pertained.

Provident's counsel used the instruction to "drive home" his closing argument to the jury. He stated:

"But part of this special relationship, ladies and gentlemen, part of what makes it special and part of the reason why I feel that you should answer 'no' on this question of breach of the covenant of good faith and fair dealing, is that because it is a two-way obligation the plaintiff has certain obligations to the insurance company.

"And it's not just the plaintiff. Either party can act through its officers, employees, agents, attorneys and/or designated representatives. Any act or omission by them is, in law, the act or omission of such party.

"That means Provident is liable for the actions of Donna Galbraith, for Sally Moore. And that means that the plaintiff is responsible for the actions of her attorneys.

"Why is that an issue in this case? *Because another instruction the Court will read to you is that an insured, like Mrs. Hale, an insured's deliberate delay or refusal to*

cooperate with the insurance company, may constitute a defense to a bad faith action against the insurer.

"Now, ladies and gentlemen, Provident was stiff-armed in '97 and '98 on the Erika Maslan records. Why? I don't know. But we were.

"*Don't reward that conduct. Don't reward that conduct.* Ms. Schweinberger sat there and admitted she never even picked up the phone. Sent letters that had statements that she knew she didn't have any basis to make, because she hadn't done anything. And that created the problem that led to the delay in getting Erika Maslan's records.

"*Don't reward that conduct. Don't find a breach of the implied covenant of good faith and fair dealing. Because both sides have obligations, and they didn't live up to their side of it*." (Italics added.)

Provident characterizes this argument as "driv[ing] home" that its conduct was reasonable and not bad faith in light of Hale's failure to cooperate—as allowed by *Kransco*. Clearly, Provident's counsel went far beyond using the erroneous instruction to support its argument that it acted reasonably in its handling of Hale's claim given the information before it and Hale's failure to supply all the information it required to process the claim. The instruction provided the lynch pin for counsel's argument that the jury should not "reward" Hale for her dilatory behavior, but should find *no breach* of the implied covenant of good faith and fair dealing whether or not Provident had acted in good faith, because Hale (through her agent Maslan and attorney Schweinberger) did not live up to her obligations. Provident clearly equated Hale's alleged breach of its contractual duty to cooperate with Provident's allegedly tortious breach of the implied covenant—precisely the equation that *Kransco* disapproved.

The jury was given a written copy of the instructions to consider during deliberations, so the absence of questions from the jury would not impact the analysis of prejudice. However, other findings made by the jury indicate that the erroneous instruction probably influenced the outcome. The jury found Provident had breached its contract with Hale, causing her financial loss. It also found fraud—both intentional concealment of a material fact and negligent misrepresentation by Provident.

The jury was specifically told that Hale's deliberate delay or refusal to cooperate with Provident may constitute a defense to the insured's bad faith action. Whether Provident needed the Maslan process notes, given the volume of medical records it possessed, was in dispute. Provident emphasized Hale's non-cooperation in its closing argument, urging the jury not to "reward" such conduct and arguing that it should not find a breach of the implied covenant because Hale had not lived up to her side of it. No other instruction cured the error. The jury's findings that Provident breached the insurance contract and intentionally concealed and negligently misrepresented material information in its dealings with Hale suggest the erroneous instruction was prejudicial. We conclude it is reasonably probable that the error resulted in a miscarriage of justice. (Cal. Const., art VI, § 13.)

VI.

The court did not abuse its discretion by rejecting Hale's "pattern and practice" evidence of Provident's handling of other claims.

Hale sought to introduce evidence of eight other insured's claims files in which residual disability benefits were denied. She also listed 12 claimant-policyholders involved in these files as witnesses. Hale argued these files and witnesses provided evidence of Provident's regular business practice of systematically denying claims under the 337 policy after 1994 and that the files and witnesses were relevant to show the insurer's misconduct. Following a hearing on Provident's Evidence Code section 352 motion in limine, the trial court refused to allow Hale to introduce any evidence of these other claims, ruling that Hale had failed to establish that they were relevant to the company's handling of her claim and, in the alternative, that any marginal relevance was outweighed by their prejudicial effect pursuant to section 352.[10] As a result, the court later refused to allow Hale's expert witness Terry to give an opinion about Provident's

10 "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

pattern and practice with respect to its handling of these types of claims where such opinion was based upon the inadmissible claims files.

We review the trial court's Evidence Code section 352 determination under the abuse of discretion standard. (*People ex rel. Lockyer v. Sun Pacific Farming Co*. (2000) 77 Cal.App.4th 619, 639-640; *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1343-1344; *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1675; Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs (TRG 2001) ¶ 8.96.2.)[11]

" 'Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion.' (*People v. Alvarez* (1996) 14 Cal.4th 155, 201 . . . .) This standard of review applies to a trial court's determination of the relevance of evidence, as well as to whether the evidence's probative value is substantially outweighed by its prejudicial effect. [Citations.] The trial court's 'discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People ex rel. Lockyer v. Sun Pacific Farming Co., supra,* 77 Cal.App.4th 619, 639-640.) It is appellant's

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11 We reject Hale's argument that the court excluded an entire class of evidence and that such a ruling was the "functional equivalent" of sustaining a demurrer or grant of a nonsuit and should be reviewed accordingly, conceding the truth of all facts presented by her, disregarding conflicting evidence, and viewing the record in the light most favorable to her. A similar claim was made and rejected by the Court of Appeal in *People ex rel. Lockyer v. Sun Pacific Farming Co., supra,* which applied the usual abuse of discretion standard to a court's exclusion of evidence under Evidence Code section 352.

In this case, the trial court excluded evidence of other claims, but did not exclude "all evidence" as was done in the cases principally relied upon by Hale, *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 27 and *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 Cal.App.4th 672, 677. In those cases, the appellate court recognized that "[i]n contrast to the usual motion in limine, which seeks to keep particular items of evidence from a jury, an 'objection to all evidence' is essentially the same as a general demurrer or motion for judgment on the pleadings seeking to end the trial without the introduction of evidence. Such an objection is properly sustained where even if the plaintiff's allegations were proven, they would not establish a cause of action. [Citations.]" (*Edwards v. Centex Real Estate Corp., supra,* 53 Cal.App.4th 15, 26; *Mechanical Contractors Assn. v. Greater Bay Area Assn., supra,*

burden to establish that the court's section 352 exclusion of evidence was a clear case of abuse and a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Burns v. 20th Century Ins. Co., supra;* see generally, Eisenberg et al., Civil Appeals & Writs, *supra*, ¶¶ 1:46, 8.89, 8.96.2.)

Hale challenges the court's exclusion of her other claims evidence, arguing that the evidence she presented was relevant and admissible to establish Provident's misconduct by showing a pattern and practice of denying similar residual disability claims. Hale relies primarily upon *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785 (*Colonial Life*) and *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610 (*Moore*), to support the relevance of the information she sought to place before the jury. Both cases are easily distinguishable.

In *Colonial Life, supra,* 31 Cal.3d 785, the Supreme Court upheld a trial court order approving an insured plaintiff's discovery seeking the names, addresses and records of other insureds whose claims were negotiated by the same claims adjuster who handled the plaintiff's claim. The Supreme Court held that discovery of this information, aimed at determining the frequency of alleged unfair settlement practices, was likely to produce evidence directly relevant to the plaintiff's damage action alleging unfair claims settlement practices under Insurance Code section 790.03, subdivision (h), breach of contract, and breach of the duty of good faith and fair dealing. The court reasoned, "[A] plaintiff may establish a claim [of unfair claim settlement practices in violation of Insurance Code section 790.03] by showing either that the acts that harmed him were knowingly committed or were engaged in with such frequency as to indicate a general business practice." (*Colonial Life, supra,* at p. 791.) Because knowledge can be proved circumstantially, "[d]iscovery aimed at determining the frequency of alleged unfair settlement practices is therefore likely to produce evidence directly relevant to the action. [¶] Other instances of alleged unfair settlement practices may also be highly relevant to

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at pp. 676-677; see also *People ex rel. Lockyer v. Sun Pacific Farming Co*., *supra,* 77 Cal.App.4th 619, 639-640.)

plaintiff's claim for punitive damages. [Citation.]" (*Id.* at p. 792.) The elements of oppression, fraud, or malice required to support punitive damages may be proven indirectly by evidence of a pattern of unfair practices. (*Ibid.*) The court concluded that "[w]ithout doubt, the discovery of the names, addresses and files of other Colonial claimants with whom [the adjuster] attempted settlements is relevant to the subject matter of this action and may lead to admissible evidence." (*Id.* at p. 792.)

However, the court also acknowledged that relevance for purposes of discovery is not the same as relevance at trial. "[C]ourts may appropriately give the applicant [for discovery] substantial leeway, especially when the precise issues of the litigation of the governing standards are not clearly established [citation]; *a decision of relevance for purposes of discovery is in no sense a determination of relevance for purposes of trial.* [Fns. omitted.]" (*Colonial Life, supra,* at p. 791, fn. 8, quoting *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 172-173, italics added.)

In *Moore,* the appellate court *affirmed* a trial court ruling admitting evidence of two other disability claims presented to the defendant insurance company, where the other claims indicated the defendant's failure to follow California's broad definitional standard for "total disability" and its insistence upon a narrower policy definition were relevant to establishing a pattern of unreasonable and misleading behavior in the review of insureds' claims for total disability. The two other claims were admitted for the limited purpose of showing that despite defendant insurer's claim to the contrary, the defendant had been informed of California's legal definition of total disability and knew that its own definition and its application of the policy definition were at variance with California law, before it denied the plaintiff's claim. (*Id.* at p. 621.) In addition, one of the two other claims was admitted for the limited purpose of showing that certain deceptive claims practices of defendant had been employed in that case and in the plaintiff's case. (*Ibid.*) The deceptive practices included the insurer's routine sending of the misleading definition policy language to its insureds and their physicians and the insurer's summary denial of claims upon obtaining physicians' opinions that the disability was not total based upon the erroneous policy definition rather than the

accurate and more expansive California definition. The appellate court agreed that "in order to establish a 'pattern of unfair claims practices' the antecedent practice must be substantially similar" to the practice challenged in the plaintiff's case. (*Id.* at p. 625.) The appellate court concluded that the policies were "substantially similar," despite different policy language as to what constituted a total disability, as both the plaintiff's policy and the other policies were subject to the same definitional legal standard and the language of both policies failed to meet the California definitional requirement. (*Id.* at p. 626.)

The *Moore* court also recognized "the principles that except as otherwise provided by statute 'all relevant evidence is admissible' (Evid. Code, § 351); that 'relevant evidence' is all evidence 'including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action' (*id.,* § 210); and that the trial court is vested with wide discretion in determining relevance under this standard." (*Id.* at p. 627.) Rejecting the appellant's claim that the court had abused its discretion under Evidence Code section 352 in admitting the evidence, the appellate court observed: "[A]bsent a clear showing of abuse, we are compelled to uphold the trial court's exercise of discretion under section 352. [Citation.]" (*Id.* at p. 628.)

Neither *Colonial Life* nor *Moore* indicates the court here abused its discretion. Initially, we point out that in both cases, the appellate court deferred to the determination of the trier of fact, finding no abuse of discretion. *Colonial Life* upheld the trial court order for discovery and *Moore* affirmed the court's decision to admit the evidence of other claims. Moreover, *Colonial Life* expressly acknowledged the distinction between the broad relevance supporting a discovery order and that required to find evidence relevant and admissible at trial. (*Id.* at p. 791, fn. 8.)

Here, the trial court ruled after an extensive hearing on Hale's offer of proof, that Hale had failed to show sufficient relevance to overcome the prejudice from admitting

the claims files. Hale had culled the seven or eight[12] files from "about 100,000" documents obtained through discovery and from which plaintiffs had "winnowed out certain documents which we felt zeroed in on the issue in this case of loss not due to the disability for which the claim was made." Counsel for Hale identified similarities in the case files as follows: all involved the 337 policy, residual disability claimants chose the third option, claimants had filed supplemental claim forms on a monthly basis from their doctor, claimants had claims of loss earnings following their disability, claimants had been asked to submit tax returns for five years before their disability, claimants were earning less than 80 percent of the chosen years. However, Hale also recognized that Provident did *not* deny the claims in these cases on a uniform basis. Hale asserted that Provident denied some of the claims outright, in others Provident used a denial to negotiate down the claim to an amount less than the prior monthly income. Some of the individuals "abandoned" their claims, others settled for less than the full benefit amount, others litigated their claims. Hale also acknowledged that Provident had based its determination upon different grounds in the eight cases. For instance, in Hale's case Provident had initially reasoned that a different year than that chosen by the insured more fairly depicted the loss of earnings due to her disability. In one of the other cases, it had determined that the claimant had voluntarily cut back his medical practice. The admitted lack of uniformity in Provident's handling of these cases supplied a basis for the court to find the files inadmissible.[13]

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12 It was unclear exactly how many files Hale wished to introduce. Nine individuals were named, and counsel variously referred to the seven or eight files.

13 Moreover, as noted by the court, Hale's offer of proof of relevance changed as the hearing progressed. Initially, Hale argued that the "pattern" the cases demonstrated was that the insureds all chose option three to measure PMI (two of the five years preceding disability), that Provident applied a loss not due to disability analysis, asked for tax records, and sought other means to disqualify insureds and used this means to negotiate downward or to deny the claims. Hale subsequently argued the pattern was that Provident asked for more and more information. Provident pointed out that the insurer can request information it needs to determine the claim. Hale contended that the files showed that two Provident employees (Susan LeVan or Carolyn Holmquist) changed the PMI elections in the eight files based on information from the individuals' tax returns.

As Provident pointed out, in each of the selected cases there was a dispute or a resolution of an issue as to whether a particular loss was due to a disability and the claimant was dissatisfied with the result. Such evidence would doubtless require mini-trials on the underlying facts of each dispute, requiring Provident to put on evidence justifying its handling of the claim in each of the selected cases. In *Moore* the two files were directly relevant for the limited purpose of demonstrating the insurer *knew* at the time it denied the plaintiff's claim that its policy definition was inconsistent with California law, yet persisted in its actions. Here the claimed similarities did not advance Hale's claim that Provident had acted wrongly by asserting in each of those actions that the loss was not due to disability. It would not be possible to determine whether Provident's handling of each of the other claims was proper without extensive hearings on the merits of each of those other claims.

Further, the other claims files were selected from among a huge number of Provident claims files, raising the issue of whether Provident must be allowed to present evidence of its proper handling of the vast majority of 337 disability claims to counter Hale's pattern and practice claim and to avoid misleading the jury. Admission of these files and the mini-trials they would spawn would be both time consuming and likely to confuse and mislead the jury.

The trial court determined that the other case evidence was not relevant to any issue in the case. In the alternative, exercising its discretion under Evidence Code section 352, the court concluded the others claims evidence would be more misleading and

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Then Hale acknowledged that different claims adjustors worked on the claims and sent the form letters, but argued that either LaVan or Holmquist authorized that the claimants be sent a misleading form letter. Hale also asserted as a similarity that the other insureds were asked to supply information not required by the policy. Hale then asserted the similarities were that all claimants chose the third option; all received a form letter which Hale contended was misleading; that upon Provident's determination that the entire loss was not due to disability (which she acknowledged Provident did in several different ways); the insured objected or retained counsel or abandoned the claim, or the matter went to litigation, or the company settled.

prejudicial than any marginal relevancy warranted. We cannot say the trial court abused its discretion under Evidence Code section 352. Consequently, the court also properly ruled that expert witness Terry could not base an opinion upon the other case files evidence and therefore could not render an opinion on whether Provident had engaged in a pattern and practice of misconduct.

VII.

Did the trial court err in granting a nonsuit/directed verdict for Provident, refusing to allow the jury to consider awarding punitive damages?

Hale contends that the trial court erred in granting a nonsuit/directed verdict for Provident on the issue of punitive damages. She asserts that the substantial evidence that supported the jury's fraud findings similarly supported its punitive damages claim and that the court erred in taking that determination away from the trier of fact.[14]

A. The parties disagree as to the standard of review we apply to grant of a nonsuit/directed verdict on a claim for punitive damages. Hale contends the usual substantial evidence review standards apply, while Provident argues that we should use the same "clear and convincing" evidence standard utilized by the trier of fact in determining whether punitive damages are warranted.

Civil Code section 3294 provides: "In an action for the breach of an obligation not arising from contract, where it is proven by *clear and convincing evidence* that the defendant has been guilty of *oppression, fraud, or malice*, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Italics added.)

However, the "weight of authority indicates that the trial court 'clear and convincing evidence' burden of proof does not supplant the appellate court standard of

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14 As a threshold matter, we reject Provident's assertion, presented in a footnote to its respondent's brief that the nonsuit/directed verdict was warranted as no admissible evidence of the company's net worth was introduced into evidence. This argument is disingenuous. The record shows the parties agreed to reopen to stipulate to Provident's net worth in the event that the trial court denied Provident's motions and allowed the jury to consider the punitive damages issue. Such bifurcation is common and recommended in bad faith insurance cases. (Croskey, *supra,* ¶ 13:313.)

review on appeal. . . ." (Eisenberg et al., Civil Appeals & Writs, *supra*, ¶ 8:141, and cases cited.)

On appeal from a judgment on a directed verdict, we view the evidence in the light most favorable to Hale. All conflicts in the evidence must be resolved and inferences drawn in her favor; and the judgment will be reversed if there was substantial evidence tending to prove all elements of her case. (See, Eisenberg et al., Civil Appeals & Writs, *supra*, ¶ 8:63.3 and cases cited.)

Nevertheless, while adhering to the substantial evidence standard, appellate courts have required a more "aggressive scrutiny of the evidence" in punitive damages appeals such as this where a finding of fraud or breach of the implied covenant of good faith and fair dealing is required to be based upon clear and convincing evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608; see, e.g., *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60-61; *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891-892; Eisenberg et al., Civil Appeals & Writs, *supra*, ¶ 8:141.2.) As Justice Werdegar explained in *Hoch v. Allied-Signal, Inc., supra,* 24 Cal.App.4th 48: "We cannot agree a nonsuit is necessarily proper whenever the court deems the plaintiff's evidence less than clear and convincing. ' " 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the [trier of fact] to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' " ' [Citations.] Where reasonable minds could differ as to whether the evidence would support punitive damages, the resolution of the conflicting inferences and the weighing of opposing evidence is for the jury; for the court to grant a nonsuit in that circumstance, or the appellate court to affirm a judgment of nonsuit, would be to usurp the jury's function." (*Id.* at p. 59, italics omitted.) Analogizing to the criminal law's requirement of proof beyond a reasonable doubt, to the United States Supreme Court's opinion in *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254-255 regarding the propriety of summary judgment on an issue requiring proof by clear and convincing evidence, and to

other cases where the burden of proof is higher than a preponderance, Justice Werdegar concluded that "a nonsuit on the issue of punitive damages is proper when no reasonable jury could find the plaintiff's evidence to be clear and convincing proof of malice, fraud or oppression. On review of a nonsuit order, we apply the same standard." (*Id.* at pp. 60-61.)

B. Civil Code section 3294 defines "oppression," "fraud" and "malice" as follows:

"(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

"(2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

"(3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

"To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences. [Citations.]' " (*Hoch v. Allied-Signal, Inc., supra,* 24 Cal.App.4th 48, 61.)

The acts which constitute "oppression, fraud or malice" involve "'intentional,' 'wilful' or 'conscious' wrongdoing of a 'despicable' or 'injurious' nature." (Croskey, *supra,* at [¶] 13:228, citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721.) Although the same evidence that proved Provident's tortious conduct may be relevant to the punitive damages, it is not determinative as a "marginally sufficient case of bad faith is not likely to prove malice or oppression by clear and convincing evidence." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., supra,* 78 Cal.App.4th 847, 909.) Nor will proof of fraud by a mere preponderance suffice to entitle plaintiff to punitive damages. (Croskey, *supra,* at [¶] 13:233-12:236.)

Even an *unreasonable* refusal to pay benefits will not suffice to support a punitive damages award without more. (Croskey, *supra,* at ¶ 13:250.) "Something more than the

mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." [Citation.]' (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894-895 . . . .)" (*Mock v. Michigan Millers Mutual Ins. Co*. (1992) 4 Cal.App.4th 306, 328, quoting Dean Prosser, italics omitted.)

We recognize that "'conduct which is intended by the defendant to cause injury to the plaintiff' constitutes malice, and malice is a basis for an award of punitive damages. *In the ordinary ex delicto action, therefore, involving intentionally wrongful conduct, the evidence sufficient to establish the tort is usually sufficient to support punitive damages.* [Italics added.] [¶] The conduct required to award punitive damages for the tortious breach of contract, however, is of a different dimension. It has been examined many times in appellate decisions, and we but summarize. First, simple breach of contract, no matter how willful and hence tortious, is not a ground for punitive damages. Such damages are accessible only upon a showing that the defendant 'act[ed] with the intent to vex, injure, or annoy.' (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922 . . . .) [¶] Punitive damages for failure to pay or properly administer an insurance claim are ordinarily, . . . based on 'malice' or 'oppression,' rather than on the third possible ground for the award, 'fraud.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269*,* 1286.)

We are convinced that a properly instructed jury might have found bad faith breach of the covenant of good faith and fair dealing and that a reasonable jury could have found Provident acted with oppression or malice, as defined in the statute. The evidence before the court was sufficient to establish that Provident's management of the Hale claim and its refusal to pay benefits was arbitrary, unfair and wholly unreasonable. More than that, a reasonable jury could have found from the evidence presented that Provident through its agents harbored a "willful and conscious disregard" for Hale's rights. Both direct and circumstantial evidence supported such a finding. Provident's refusal to pay disability benefits to Hale occurred in the context of extreme pressure on

Provident to reduce the reserves dedicated to funding 337 disability claims in the face of staggering projected future losses. Evidence was presented that the company moved to a strategy of aggressive claims management, including setting targets for claims resolution or termination of 84 percent. Such strategies were evident in Hale's treatment by company personnel, including the failure of Provident to advise Hale initially that she should pick the alternative which would give her the highest PMI, Provident's erroneous selection of the wrong PMI figure, its refusal to acknowledge clearly to Hale that it had made a mistake in its PMI calculation, pressure tactics aimed at pushing her to settle for less than the disability benefits she was entitled to, including Galbraith's responding to Hale's PMI inquiry by asking whether Hale believed it was "fair" that Provident had to pay her "all this money," investigator Moffatt's December visit to Hale, urging her to accept future benefits at a decreasing rate, pressuring her to make a decision "today," disparaging her desire to speak with her husband before agreeing to a settlement, and threatening that if she went on residual disability, the company " 'will just paper you to death.' " A reasonable jury could find that Provident did then attempt to "paper [Hale] to death," by requiring more and more financial information and medical documentation at a level which was far beyond that necessary to properly determine her claim. Consequently, we believe a reasonable jury could have found oppression or malice by clear and convincing evidence.

Moreover, a reasonable jury could have found the evidence of intentional concealment by the clear and convincing evidence required to support an award of punitive damages for fraud under the definition of Civil Code section 3294: "Fraud means . . . concealment of a material fact known to the defendant with the intention . . . of thereby depriving a person of property or legal rights . . . ." We disagree with the implied finding of the trial court that no reasonable jury could have found clear and convincing evidence of a fraud sufficient to warrant punitive damages. The jury found fraud in the *intentional* concealment verdict, which we have heretofore held was supported by substantial evidence. A reasonable jury could have found that Hale had proved by clear and convincing evidence that Provident intentionally failed to disclose and concealed that

it had sufficient information to allow it to process Hale's claim and it did not need the additional documents it demanded and that it did so with the intent to deny Hale her property (the disability benefits owed her) and her legal rights.

Cases cited by Provident as supporting the upholding of a nonsuit on punitive damages do not address whether an intentional concealment verdict will necessarily support submitting punitive damages to the jury. Several do not involve an underlying tort of fraud. *Stewart v. Truck Ins. Exchange, supra,* 17 Cal.App.4th 468 involved an underlying finding of bad faith breach of contract. The appellate court found no substantial evidence of malice—the only basis asserted by the plaintiff for imposition of punitive damages. (*Id.* at p. 482 and fn. 26.) *Shade Foods Inc. v. Innovative Products Sales & Marketing, Inc., supra,* 78 Cal.App.4th 847, concluded that the marginally sufficient case of bad faith could not support a finding of malice or oppression by clear and convincing evidence. (*Id.* at p. 909.) In *Hoch v. Allied-Signal, Inc., supra,* 24 Cal.App.4th 48, also not involving fraud, the court upheld a nonsuit where the evidence could not reasonably be considered clear and convincing proof of malice. (*Id.* at p. 61.) Nor does *Mock v. Michigan Millers Mutual Ins. Co., supra,* 4 Cal.App.4th at p. 328 involve a finding of fraud.

College Hospital v. Superior Court, supra, 8 Cal.4th 704, 721 and *Barry v. Rascov* (1991) 232 Cal.App.3d 447, 457, upheld nonsuits on punitive damages while affirming tort verdicts. Both cases upheld the nonsuits on the basis that the plaintiffs had failed to show that the employers knew that their employees were unfit or that the employers intended to injure the plaintiffs, willfully disregarded their safety, or engaged in despicable conduct. Such distinction is not present here. Provident management never disassociated itself from the actions of its employees or agents. Indeed, the evidence established that Provident management knew, directed, supported and tried to justify the treatment of Hale.

We believe *Notrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911 (*Notrica*), is more applicable. There, the plaintiff employer sued the State Compensation Insurance Fund to recover damages for tortious breach of the implied covenant of good

faith and fair dealing and for unfair business practices (Bus. & Prof. Code, § 17200) challenging the defendant's failure to estimate reasonable claim reserve levels, resulting in the plaintiffs paying higher premiums and receiving lower dividends. The defendant had changed its policy for determining adequate reserves from one of "realistic and reasonably anticipated final cost" to one that defined adequate reserves as the "maximum probable potential" cost, and had concealed that policy change from plaintiff and other employers. (*Id.* at pp. 924, 927.) On appeal, the appellate court found substantial evidence supporting an award of punitive damages, rejecting the defendant's claim that there was insufficient nexus between the conduct upon which compensatory damages were based and the fraud which provided the basis for the punitive damages on the bad faith action. "All that is required is that the fraud must equate to the conduct which gives rise to liability—in this case bad faith." (*Notrica, supra,* 70 Cal.App.4th 911, 947-948.) In other words, for punitive damages, "all that is required is that the fraud *relate to the conduct* giving rise to bad faith liability; i.e., that in breaching the implied covenant, the insurer acted fraudulently (misrepresenting or concealing essential facts, etc.)" (Croskey, *supra,* at ¶ 13:232, citing *Notrica, supra*.)

As in *Notrica,* the intentional concealment (fraud) here was itself tortious and also related to the conduct giving rise to possible bad faith liability, supplying another of the extra components that supported the award of punitive damages. We do not say that Hale necessarily will prevail in convincing a jury to find by clear and convincing evidence that Provident's conduct was done in bad faith or with the requisite malice, fraud or oppression warranting the award of punitive damages. Nor do we conclude that a jury must necessarily find that the evidence of intentional concealment was clear and convincing such as to warrant the imposition of punitive damages. We do conclude that on the evidence here, a reasonable jury could so find and that Hale deserved the opportunity to have the jury—as the trier of fact—make the determination. (*Hoch v. Allied-Signal, Inc., supra,* 24 Cal.App.4th 48, 59.) We conclude the trial court erred in granting the nonsuit/directed verdict for Provident on the punitive damages claim.

DISPOSITION

Prejudicial instructional error requires reversal and retrial of Hale's cause of action for breach of the covenant of good faith and fair dealing. Similarly the court erred in granting Provident a nonsuit/directed verdict on the punitive damages claim. The judgment in favor of Provident on the cause of action for breach of the covenant of good faith and fair dealing is reversed, as is the nonsuit/directed verdict on punitive damages. In other respects the judgment and post-judgment orders of the trial court are affirmed. The matter is remanded to the trial court for further proceedings, consistent with this opinion.

Hale is awarded her costs on appeal.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.